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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Anichab, The		218
Arum, The		12

B.

Barcroft *v.* Barcroft		435
Bathurst (Earl) *v.* Cirencester Parish		381
Beeton *v.* Beeton		417
Bernisse, The		173
Blonde, The		155
Bluhm, In the Estate of		127
Borre, The		390
Bristol City, The	(C. A.)	444

C.

C. (otherwise H.) *v.* C.		399
Cairnsmore, The		224
Cap Palos, The	(C. A.)	458
Cirencester Parish, Bathurst (Earl) *v.*		381
City of Edinburgh, The		70
———	(C. A.)	264
Countess, The		279
Crocker *v.* Crocker	(C. A.)	25

D.

Danube II., The	(C. A.)	183

E.

		PAGE
Elve, The		173
Eva, The		454

F.

Foster *v.* Foster	(C. A.)	438
Franklin *v.* Franklin		407

G.

Gaskell *v.* Gaskell		425
Gossage, In the Estate of. Wood *v.* Gossage	(C. A.)	194
Gossage, Wood *v.* In the Estate of Gossage	(C. A.)	194
Gulf of Suez, The	(C. A.)	318
Gunda, The		224

I.

Ibis VI., The	(C. A.)	255

J.

James W. Elwell, The		351

K.

Karamea, The	(C. A.)	76
Kenora, The		90
Keyes *v.* Keyes		204
Kronprinz Olav, The	(C. A.)	52

L.

	PAGE
Lake Farragut, The	305
Leavis *v.* Leavis	299
Lisa, The	38
Lomonosoff, The	97

M.

Marie Leonhardt, The	1
Mogileff, The	236

N.

New Sweden, The	473

O.

Oranje Nassau, The	190
Oregon, The	224
Oscar II., The	173

P.

Palmer *v.* Palmer	378

R.

		PAGE
Rutter *v.* Rutter		136
——————— (No. 2)		421

S.

Scott *v.* Scott	(C. A.)	107

T.

Tarbert, The		372
Thomasson, In re		378
Tolla, The		22
Tromp, The		337
Turid, The	(C. A.)	146

V.

Ver Mehr *v.* Ver Mehr	404
Vigilant, The	312

W.

Walter *v.* Walter		302
Williams *v.* Williams		131
Willmott *v.* Willmott		143
Wood *v.* Gossage. In the Estate of Gossage	(C. A.)	194

TABLE OF CASES CITED.

A.

		PAGE
A. *v.* A.	[1901] P. 284	422
Abonema, The	[1919] P. 41	220
Acatos *v.* Burns	3 Ex. D. 282	42
Acteon, The	2 Dods. 48	175
Afina van Linge, The	Swa. 514	244
Africano, The	[1894] P. 141	370
Aktieselskab Helios *v.* Ekman & Co.	[1897] 2 Q. B. 83	153
Aktieselskabet Geysir *v.* Dansk Svovlsyre Fabrik	31 L. J. (Q. B.) 26	41
Aktieselskabet Olivebank *v.* Dansk Svovlsyre Fabrik	24 Com. Cas. 178.	41
Albano, The	[1907] A. C. 193	331
Alexander, The	1 W. Rob. 346	246
Andoni, The	[1918] P. 14	18
André Théodore, The	10 Asp. M. L. C. 94	242
Aneroid, The	2 P. D. 189.	361
Anichab, The	[1919] P. 329	220
Anna, The	1 P. D. 253.	242
Annette, The	[1919] P. 105	99
Anquez *v.* Anquez	L. R. 1 P. & M. 303	303
Aristocrat, The	[1908] P. 9	321
Armitage *v.* Attorney-General	[1906] P. 135	208
Armytage *v.* Armytage	[1898] P. 178	207
Ash *v.* Ash	[1893] P. 222	409
Asiatic Petroleum Co. *v.* Lennard's Carrying Co.	[1914] 1 K. B. 419	452
Atlas, The	2 Hagg. Adm. 48.	358
Augusta, The	1 Dods. 283.	359

B.

Bahia, The	L. R. 1 A. & E. 15	257
Bailey *v.* Bailey	13 Q. B. D. 855	300
Ballanoch, The	[1907] P. 170	323
Bamfield *v.* Goole and Sheffield Transport Co.	[1910] 2 K. B. 94	42
Banbury Peerage Case	Le Marchant's Report	433
Bannerjee *v.* Bannerjee	3 Calcutta W. N. 250	208
Bass *v.* Bass	[1915] P. 17	408
Bater *v.* Bater	[1906] P. 209	214
Bates *v.* Bates	14 P. D. 17.	300
Beavan *v.* Beavan	31 L. J. (P.) 166; 7 L. T. 435	138
Beeby *v.* Beeby	1 Hagg. Ecc. 789.	32
Bellanoch, The	[1907] P. 170	89
Benlarig, The	14 P. D. 3	373
Bernstein *v.* Bernstein	[1893] P. 292	28
Berry *v.* Pratt	1 B. & C. 276	270
Betsey, The	1 C. Rob. 93	176

		PAGE
Blenden-Hall, The	1 Dods. 414.	92
Bloomer, The	11 L. T. (N. S.) 46	360
Blue Bell, The	[1895] P. 242	306
Bosvile *v.* Attorney-General	12 P. D. 177	432
Bowden *v.* Bowden	62 Sol. J. 105	432
Bradford Corporation *v.* Myers	[1916] 1 A. C. 242	185
Bradley *v.* Bradley	3 P. D. 47	118
——— *v.* Newsom, Sons & Co.	[1919] A. C. 16	461
Braithwaite *v.* Foreign Hardwood Co.	[1905] 2 K. B. 543	460
Branston, The	2 Hagg. Adm. 3n	99
Brass *v.* Maitland	26 L. J. (Q. B.) 49	42
Bridgman *v.* Bridgman	20 L. T. 87	409
Brown *v.* Brown	2 Rob. Ec. 302	138
——— *v.* Franklyn	Carth. 474	222
Browning *v.* Browning	[1911] P. 161	439
Burnaby *v.* Baillie	42 Ch. D. 282	432
Buron *v.* Denman	2 Ex. 167	175

C.

Caliph, The	[1912] P. 213	185
Callaby *v.* Callaby	37 Times L. R. 241	144
Campbell *v.* Campbell	Deane's Ecc. Cas. 285	33
Cecilie, The	4 P. D. 210.	359
Cella, The	14 P. D. 82.	361
Cheerful, The	11 P. D. 3	374
Chile, The	[1914] P. 212	2, 155
Chyebassa, The	[1919] P. 201	14
Ciocci *v.* Ciocci	1 Spinks, 121	438
City of Edinburgh, The	[1920] A. C. 466	71, 275
Clan Sutherland, The	[1918] P. 332	92
Clarke, In re	[1898] 1 Ch. 336	360
Clutha Boat 147, The	[1909] P. 36	306
Collins *v.* Brook	29 L. J. (Ex.) 255	138
——— *v.* Collins	9 App. Cas. 205	33
——— *v.* Godefroy	1 B. & Ad. 950	270
Compania Naviera Vasconzada *v.* Churchill & Sim	[1906] 1 K. B. 237	338
Comtesse de Frègeville, The	Lush. 329	236
Cooper *v.* Cooper	3 Sw. & Tr. 392	301
Crabb *v.* Crabb	L. R. 1 P. & M. 601	134
Craft captured on the Victoria Nyanza	[1919] P. 83	221
Craig *v.* Delargy	6 R. 1269	339
Cramp *v.* Cramp	[1920] P. 158	31
Crathie, The	[1897] P. 178	55, 284
Crossfield *v.* Kyle Shipping Company	[1916] 2 K. B. 885	338

D.

Dance *v.* Dance	1 Hagg. Ecc. 794n	32
Danckebaar Africaan, The	1 C. Rob. 107	158
Davis *v.* Garrett	6 Bing. 716	471
De Mattos *v.* Saunders	L. R. 7 C. P. 570	283
Dent *v.* Dent	4 Sw. & Tr. 105	33
Der Mohr	3 C. Rob. 129	175
Diamond, The	[1906] P. 282	448

		PAGE
Diligentia, The	1 Dods. 404.	219
Dirigo, The	[1920] P. 425	191
Doe *v.* Harris	8 Ad. & E. 1	198
Drummond *v.* Parish	3 Curt. 522	198
Duc d'Aumale, The	[1904] P. 60	92
Durant *v.* Durant	1 Add. 114	379
Dyke *v.* Stephens	30 Ch. D. 189	138

E.

Eliza, The	Spinks, 88	227
Ellis *v.* Ellis	8 P. D. 188.	404
El Salto	25 Times L. R. 99	236
Elsebe, The	5 C. Rob. 174	227
Emancipation, The	1 W. Rob. 124	359
Essex (Countess of), In re	2 St. Tr. 786	401
Evans *v.* Watson	3 C. B. 327	269

F.

Fairfield, The	Marsden's Adm. Cas. 252	360
Fairlie *v.* Fairlie	6 Paton, 121	32
Feldmarschall, The	[1920] P. 289	218
Five Steel Barges	15 P. D. 142	374
Flannagan *v.* Shaw	[1920] 3 K. B. 96	188
Flora, The	1 Hagg. Adm. 298	360
Flower *v.* Flower	L. R. 3 P. & M. 132	418
Foltina, The	1 Dods. 450.	220
Foong Tai *v.* Buchheister	[1908] A. C. 458	239
Foster's Case	11 Rep. 56*b*	188
Fuller *v.* Lane.	2 Add. 419	387
Fyffe *v.* Fyffe	[1920] P. 310	111

G.

G. *v.* M.	10 App. Cas. 171	399
Gale *v.* Laurie.	5 B. & C. 156	75
Gandy *v.* Gandy	7 P. D. 168.	135
Gardner Peerage Case	Le Marchant's Report	432
Gertruyda, The	2 C. Rob. 211	220
Gibaud *v.* Great Eastern Railway Company	[1921] 2 K. B. 426	471
Giles *v.* Giles	[1900] P. 17	138
Gough *v.* Gough	33 L. J. (P. & M.) 136	409
Great Eastern, The	L. R. 2 A. & E. 88	23
Greenwell *v.* Howell	[1900] 1 Q. B. 535	185
Grose *v.* Grose	78 L. T. 89	413

H.

Haabet, The	[1899] P. 295	358
Hale *v.* Bates	E. B. & E. 575	267
Halfen *v.* Boddington	6 P. D. 13	422
Hall *v.* Hall	60 L. J. (P. & M.) 73	33

		PAGE
Hallam *v.* Hallam	20 Times L. R. 34	414
Halley, The	L. R. 2 P. C. 193	14
Hardie *v.* Hardie	70 L. J. (P. & M.) 29	379
Harley *v.* Harley	11 Ir. Ch. Rep. 451	360
Harvey *v.* Lovekin	10 P. D. 122	138
——— *v.* Pocock	11 M. & W. 740	360
Head *v.* Head	1 S. & S. 150; T. & R. 138	433
Heinrich Björn, The	8 P. D. 151; 10 P. D. 44; 11 App. Cas. 270	242
Hensley *v.* Hensley	122 L. T. 814	412
Hero, The	[1911] P. 128	323
Hestia, The	[1895] P. 193	374
Hilding, The	[1921] 1 A. C. 518	158
Hiscock, In the Goods of	[1901] P. 78	203
Holman *v.* Wade	The Times, May 11, 1877	146
Hoogskarpel, The	Unreported	220
Hunt *v.* Hunt	4 D. F. & J. 221	134
Huntsman, The	11 Asp. M. L. C. 606	324

I.

Ida, The	32 L. T. 541	339
India, The	1 W. Rob. 406	374
Indomitable, The	Swa. 446	359
Ivimey *v.* Ivimey	[1908] 2 K. B. 260	300

J.

Jane, The	1 Dods. 461.	359
Jefferson, The	1 C. Rob. 325	192
Jenny Lind, The	L. R. 3 A. & E. 529	454
Jones *v.* Mersey Docks and Harbour Board	18 Com. Cas. 163.	284
Judreidini *v.* National British and Irish Millers' Insurance Company	[1915] A. C. 499	460

K.

Karla, The	Br. & Lush. 367	255
Karnak, The	L. R. 2 A. & E. 289	358
Keats *v.* Keats	1 Sw. & Tr. 334	25
Kennedy *v.* Kennedy	[1907] P. 49	131
Kerly, In re	[1901] 1 Ch. 467	392
Kingston's (Duchess of) Case	20 St. Tr. 355	401
Kitchen *v.* Irvine	28 L. J. (Q. B.) 46	356
Kolpino, The	73 L. J. (P.) 29	92
Kutner *v.* Phillips	[1891] 2 Q. B. 267	189

L.

L. *v.* B.	[1895] P. 274	402
Latham *v.* Latham	2 Sw. & Tr. 299	404
Leigh, In re	40 Ch. D. 290	126
Le Jonet	L. R. 3 A. & E. 556	103

		PAGE
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	207
Lennard's Carrying Company *v.* Asiatic Petroleum Co.	[1914] 1 K. B. 419; [1915] A. C. 705	448
Leonora, The	[1919] A. C. 974	3
Leucade, The	Spinks, 217	174, 227
Lewis *v.* Lewis	2 Sw. & Tr. 394	422
—— *v.* ——	[1892] P. 212	422
Lilley *v.* Doubleday	7 Q. B. D. 510	467
Lindo *v.* Rodney	2 Doug. 612n.	3, 161, 222
Llanelly, The	[1914] P. 40	321
London and South Western Railway Company *v.* James	L. R. 8 Ch. 241	313

M.

Macarthur *v.* Macarthur	58 L. J. (P. & M.) 70	379
Maidlow *v.* Maidlow	[1914] P. 245	110
Mallet *v.* Great Eastern Railway Company	[1899] 1 Q. B. 309	471
Marianne, The	[1891] P. 180	242
Marie Leonhardt, The	[1921] P. 1	155
Marnell *v.* Pickmore	2 Esp. 473	138
Martineaus *v.* Royal Mail Steam Packet Company	17 Com. Cas. 176.	338
Matthews *v.* Matthews	1 Sw. & Tr. 499; 3 Sw. & Tr. 161	134
Maudslay, Sons & Field, In re.	[1900] 1 Ch. 602	66
Melomane, The	5 C. Rob. 41	218
Mentor, The	1 C. Rob. 179	174
Mercurius, The	1 C. Rob. 80	192
Miller *v.* James	8 Moo. C. P. 208	392
Mitchell, Cotts & Co. *v.* Steel Brothers & Co.	[1916] 2 K. B. 610	41
Morgan *v.* Morgan	12 L. T. 199	139
Morrall *v.* Morrall	6 P. D. 98	134
Morris *v.* Davies	5 Cl. & F. 163	433
Morrison & Co. *v.* Shaw, Savill and Albion Company	[1916] 2 K. B. 783	180, 471
Mortimer *v.* Mortimer	2 Hagg. Con. 310	134
Moss *v.* Moss	[1916] P. 155	32

N.

N. *v.* M.	2 Rob. Ecc. 625	399
Neptune, The	1 Hagg. Adm. 227	99
————	3 Knapp. P. C. 94	246
Nereide, The	9 Cranch, 388	157
New Chinese Antimony Company *v.* Ocean Steamship Company	[1917] 2 K. B. 664	339
Niboyet *v.* Niboyet	4 P. D. 1	208
Nicolas *v.* Nicolas	[1919] W. N. 267.	111
Nifa, The	[1892] P. 411	151
Northledge *v.* Northledge	70 L. T. 815	144
Norton's Settlement, In re	[1908] 1 Ch. 471	213

O.

		PAGE
Olive, The	Swa. 292	259
Olympic, The	[1913] P. 92	283
Onni, The	Lush. 154	247
Ophelia, The	[1915] P. 129	3
Oscar II., The	[1920] A. C. 748	175
Ostsee, The	9 Moo. P. C. 150	174, 227
Ousey *v.* Ousey	1 P. D. 56	422

P.

Pacific, The	Br. & Lush. 243	361
Panthea, The	1 Asp. M. L. C. 133	244
Parsons *v.* Parsons	[1907] P. 331	422
Paspati *v.* Paspati	[1914] P. 110	138
Penrith Castle, The	[1918] P. 142	14
Perla, The	Swa. 230	252
Perrin *v.* Perrin	[1914] P. 135	379
Phillips *v.* Phillips	[1917] P. 90	132
Playfair *v.* Musgrove	14 M. & W. 239	361
Popkin *v.* Popkin	1 Hagg. Ecc. 765*a*	439
Port Victor, The	[1901] P. 243	374
Potter *v.* Rankin	L. R. 5 P. C. 518	263
Princess Charlotte, The	33 L. J. (Ad.) 188	361

Q.

Quartermaine *v.* Quartermaine	[1911] P. 180	422
Quinn *v.* Quinn	[1920] P. 65	139

R.

Raleigh *v.* Goschen	[1898] 1 Ch. 73	175
Rankine *v.* Raschen	4 R. 725	55, 283
Ranza, The	79 L. J. (P.) 21n	324
Rayment *v.* Rayment	[1910] P. 271	207
Rebeckah, The	1 C. Rob. 227	220
Redfern *v.* Redfern	[1891] P. 139	412
Reg. *v.* Arkwright	12 Q. B. 960	125
—— *v.* Clarence	22 Q. B. D. 23	439
Riga, The	L. R. 3 A. & E. 516	241
Rio Tinto, The	9 App. Cas. 356	242
Robertson *v.* Robertson	6 P. D. 119.	409
———— *v.* ————	8 P. D. 94	108
Roe *v.* Roe	[1916] P. 163	132
Royal Arch, The	Swa. 269	358
Rush *v.* Rush	[1920] P. 242	413
Russell *v.* Russell	[1895] P. 315; [1897] A. C. 395	302, 303, 436, 439

S.

Salacia, The	2 Hagg. Adm. 262	99
Sampson and Wall, In re	25 Ch. D. 482	126
Saunders *v.* Saunders	[1897] P. 89	414

		PAGE
Schiller, The Cargo ex	2 P. D. 145.	99
Scindia, The	2 M. L. C. (O. S.) 232	92
Shaw *v.* Gould	L. R. 3 H. L. 55	215
Sheehy, In re	1 P. D. 423.	379
Sidney *v.* Sidney	36 L. J. (P. & M.) 73; L. R. 1 P. & M. 78	120
Simonds *v.* Hodgson	3 B. & Ad. 50	358
Sinclair *v.* Sinclair	13 M. & W. 640	138
Slater *v.* Pinder	L. R. 7 Ex. 95	369
Slaughter *v.* Talbot	Willes, 190	137
Slingsby *v.* Attorney-General	32 Times L. R. 364	139
Smith *v.* Buller	L. R. 19 Eq. 473	263
—— *v.* Smith	7 P. D. 84	409
Snow *v.* Snow	2 Notes of Cases, Sup. XII.	32
Soblomsten, The	L. R. 1 A. & E. 293	244
Somerset (Duke of), In re	34 Ch. D. 465	138
Spering *v.* Spering	3 Sw. & Tr. 211	134, 303
Stainbank *v.* Fenning	11 C. B. 51	358
———— *v.* Shepard	13 C. B. 418; 22 L. J. (Ex.) 341	359, 365
Stephens *v.* Wintringham	3 Com. Cas. 169	151
Stewart *v.* Steele	4 Man. & G. 669	271
Stigstad, The	[1919] A. C. 279	3
Südmark, The	[1918] A. C. 475	475
Sunlight, The	[1904] P. 100	321
Svanfos, The	[1919] P. 189	98
Swetnam *v.* Archer	8 Mod. 338	386

T.

Tattersall *v.* Knight	1 Phill. 232	388
Taylor *v.* Burger	8 Asp. M. L. C. 364	13
Temperley *v.* Scott	8 Bing. 392	268
Thornton *v.* Thornton	I. L. R. 10 Bombay, 422	209
———— *v.* ————	11 P D. 176	209
Tomkins *v.* Tomkins	1 Sw. & Tr. 168	442
Townson *v.* Townson	78 L. T. 54	409
Tress *v.* Tress	12 P. D. 128	132
Tucker, In re	[1897] P. 83	379
Tweedale, In the Goods of	L. R. 3 P. & M. 204	198
Twentje, The	13 Moo. P. C. 185	247
Two Friends, The	1 C. Rob. 271	98

U.

U. *v.* J.	L. R. 1 P. & M. 460	399
Ulysses, Cargo ex	13 P. D. 205	98
Underwriter, The	1 Asp. M. L. C. 127	244
Union Bank of London *v.* Lenanton	3 C. P. D. 243	368
United States, The	[1920] P. 430	474
Uskmoor, The	[1920] P. 250	323

V.

Vivian *v.* Kennedy	63 L. T. 778	138
Vrede, The	Lush. 322	99

W.

		PAGE
Wahlberg *v.* Young	4 Asp. M. L. C. 27n	313
Wait *v.* Wait	L. R. 2 P. & M. 228	418
Walcot *v.* Ochterlong	8 Ad. & E. 4n	198
Walker *v.* Walker	76 L. T. 234	409
Walter *v.* Walter	[1921] P. 302	436
Wardrop, In the Estate of	[1917] P. 54	199
Warkworth, The	9 P. D. 145.	313
Warrender *v.* Warrender	2 Cl. & F. 488	215
Warter *v.* Warter	15 P. D. 152	209
Waters *v.* Waters	34 L. T. 33	379
Webster *v.* Seekamp	4 B. & Al. 352	246
Wellgunde, The	18 Times L. R. 719	23
Wernher, In re	[1918] 1 Ch. 339	186
West Cock, The	[1911] P. 208	461
West Friesland, The	Swa. 454; 13 Moo. P. C. 185	244, 247
Western Belle, The	10 Asp. M. L. C. 279	306
William, The	6 C. Rob. 316	176
Williams, Ex parte	L. R. 7 Ch. 314	369
——— *v.* Williams	3 Sw. & Tr. 547	436
——— *v.* ———	[1921] P. 131	436
Wilson *v.* 1st Edinburgh City Royal Garrison Artillery Volunteers	7 F. 168	185
——— *v.* Wilson	L. R. 2 P. & M. 435	208

Z.

Zacheman, The	5 C. Rob. 152	227
Zamora, The	[1916] 2 A. C. 77	175
Zephyrus, The	1 W. Rob. 329	374
Zoe, The	11 P. D. 72.	56

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[ADMIRALTY.]

(In Prize.)

THE MARIE LEONHARDT.

1920
July 27;
Sept. 21;
Oct. 19.

Prize Court—Enemy Merchant Ship in British Port—Outbreak of War—Seizure—Detention—Days of Grace—Hague Convention No. VI. of 1907—Absence of Reciprocity—Condemnation.

In the absence of reciprocal agreement to the contrary, merchant ships of a belligerent found in an enemy port at the outbreak of hostilities are subject to confiscation; and the practice whereby in modern times such ships have been allowed to depart freely within a given fixed time (as provided by Hague Convention, No. VI. of 1907), constitutes an act of grace and not a rule of international law obligatory upon all civilized states.

Motion for the condemnation of an enemy ship.

The *Marie Leonhardt*, a German steamship of 1468 tons gross, of the Port of Hamburg, was found in the Port of London on the outbreak of war and was seized on August 5, 1914. On August 17, 1914, a writ was issued on behalf

1920

THE MARIE LEONHARDT.

of the Procurator-General claiming the condemnation of the vessel.

By art. 1 of Hague Convention No. VI. of 1907, it is provided that when a belligerent merchant ship is at the commencement of hostilities in an enemy port, "it is desirable" that it shall be allowed to depart freely either immediately or after a reasonable number of days of grace; and art. 2 provides that a merchant ship which is not allowed to leave may not be confiscated, but the belligerent may merely detain it on condition of restoring it after the war. Great Britain signed this Convention, and Germany also signed it but under reservation of art. 3 and of part of art. 4. By an Order in Council of August 4, 1914, it was ordered that enemy merchant ships, which at the outbreak of hostilities were in any British port, should be allowed until August 14 for departure, if information was obtained that the treatment of British merchant ships in enemy ports was not less favourable. Representations were made to Germany through the United States Ambassador, but no satisfactory information was obtained that Germany would consent to allow British vessels detained in German ports to depart, and on October 1, 1914, the application for condemnation of the *Marie Leonhardt* came before the President, Sir Samuel Evans. The learned judge, on the ground that the affidavit in support was insufficient, struck out the appearance which had been entered on behalf of Leonhardt and Blomberg, the owners of the *Marie Leonhardt*, and, in accordance with the order generally known as "*The Chile* order" (1) ordered the ship to be detained by the Marshal until further order. On January 10, 1920, the Treaty of Peace between Great Britain and Germany was ratified, and on July 16, 1920, the Treasury Solicitor consenting, a fresh appearance was entered on behalf of Leonhardt and Blomberg. On behalf of the Crown affidavits were filed putting on record the atrocities and barbarities committed by Germany in violation of the laws of civilized warfare.

(1) [1914] P. 212.

1920

THE MARIE LEONHARDT.

1920. July 27; Sept. 21. *Sir Gordon Hewart A.-G.* (with him *Sir Ernest Pollock S.-G.*, *Bowstead* and *Pearce Higgins*) for the Procurator-General. Under the ordinary rules of international law a belligerent is entitled on the outbreak of war to seize enemy ships found in his ports and a Prize Court is entitled to condemn them as good and lawful prize: see Lord Mansfield's judgment in *Lindo* v. *Rodney*. (1) The rigour of the strict application of the rules of international law may of course be modified by agreement, as in the case of Hague Convention VI. Germany however only ratified that Convention subject to reservations, and also by art. 6 of the Convention, it is a condition precedent to its coming into force that all the belligerents shall be parties to it. Several of the belligerents—and in particular the United States—were not parties. But further, even if all the conditions were satisfied, Germany by her misconduct has disentitled herself to the right to claim whatever benefits she might have obtained under the agreement. Nothing was left undone which cruelty, savagery or wickedness could suggest, and Great Britain is justified by way of retaliation for the flagrant violation, not only of the Hague Conventions to which Germany was a consenting party, but of the rules of international law, in refusing to observe in her own relation to Germany the terms of Convention VI.: see *The Ophelia* (2); *The Leonora* (3); *The Stigstad*. (4) The question really is not whether Great Britain owes it to Germany but whether she owes it to herself to abide by Convention VI. The only obligation which could be alleged is that this country was a party to that Convention. But Germany expressly reserved art. 3 of the Convention, and although on the outbreak of war this country would have been entitled to take up the attitude that the Convention was therefore of no effect, the attitude in fact adopted was to give Germany the opportunity of coming in even at that eleventh hour. Accordingly the reciprocal

(1) (1782) 2 Doug. 612*n*.
(2) [1915] P. 129, 176.
(3) [1919] A. C. 974, 991.
(4) [1919] A. C. 279.

1920

THE MARIE LEONHARDT.

offer of days of grace was made in the earliest days of the war, and if an intimation of assent had been received from Germany there can be no doubt that she would have enjoyed the benefit of the agreement to which she had previously refused to assent. She allowed that opportunity to go, and whatever shred of obligation might be said to have existed, or to have been potential, owing to Great Britain's agreement to Convention VI., disappeared. In these circumstances there is no ground for suggesting that Great Britain owes it to herself to be lenient. Neither in the Armistice terms (which provided (art. 30) that while merchant ships in German hands were to be restored to the Allied Powers there was to be no reciprocity in that matter) nor in the Treaty of Peace is there any mention of Convention VI.; nor does it appear that any claim was ever made by the German delegates for the application of the Convention in their proposed amendments to the terms of the Treaty. In these circumstances the *Marie Leonhardt* should be condemned.

Lewis Noad for the claimants. At the time the *Marie Leonhardt* was seized a custom had arisen by which civilized States for many years had allowed to enemy vessels within the ports of the respective belligerents a period of time in which they might depart without molestation: see Hall's International Law, 7th ed., p. 477, and Pearce Higgins' Hague Peace Conferences, p. 300. No relief is claimed under Hague Convention VI. itself. That Convention was merely declaratory of the custom which by the time of the outbreak of the war in 1914 had sufficient sanction to make it a rule of international law which Prize Courts ought to apply. If, therefore, the vessel was entitled to days of grace the seizure was wrongful and the question of retaliation does not arise; but, assuming that the seizure was lawful, the conduct of Germany subsequent to August, 1914, does not disentitle her to the protection afforded by modern international usage. The Court should apply the law as it existed in August, 1914. It is not the function of the Prize Court

to impose reprisals or retaliation; if the Court were so empowered the British Reprisals Orders in Council would have been unnecessary.

Sir Ernest Pollock S.-G. in reply. There is no right at international law, apart from Convention, to days of grace. This is illustrated by the conduct of Germany herself on the outbreak of war, and also by the attitude of the United States as regards Convention VI. Germany never gave up the British vessels which were detained in Hamburg on the outbreak of war, and the United States refused to sign Convention VI. on the ground that it was "an unsatisfactory compromise between those who believe in the existence of a right and those who refuse to recognise the legal validity of the custom which has grown up in recent years": Pearce Higgins' Hague Peace Conferences, p. 307.

Cur. adv. vult.

Oct. 19. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: This is a motion on behalf of His Majesty's Procurator-General for condemnation of a German steamship, *The Marie Leonhardt*, which was found in the Port of London at the outbreak of war with Germany, was seized by His Majesty's Customs on August 5, 1914, and on August 17, 1914, was made the subject of proceedings in this Court. The claim made by the writ in the action is for a decree that the ship and her cargo belonged at the time of capture and seizure to enemies of the Crown, and as such or otherwise had become subject to condemnation as good and lawful prize, and as droits of Admiralty.

The cargo proved to belong to British claimants and was presently released. As to the ship, appearances were entered for Leonhardt & Blumberg, of Hamburg, as owners; for Fredrik Petersen, trading as Harper & Co., as agent in England on behalf of the owners, and in respect of personal claims for brokerage; and by Isaacs & Sons, Ld., of London, for moneys advanced and bunker coals supplied.

1920

THE MARIE LEONHARDT.

The President.

On October 1, 1914, the cause in prize was brought on for hearing before the President, Sir Samuel Evans, who struck out the appearance on behalf of the owners on the ground that the same was not supported by any sufficient affidavit, and, after consideration of the evidence adduced on behalf of the Crown, pronounced the ship to have belonged at the time of seizure to enemies of the Crown and as such to have been lawfully seized, and upon the application of counsel for the Procurator-General, ordered the ship to be detained by the Marshal until further order. In January, 1915, proceedings were duly taken under which the vessel was temporarily requisitioned for the service of the Crown, without appraisement, in accordance with the provisions of Order XXIX. of the Prize Court Rules as amended. Liberty to apply was reserved by the decree of October 1, 1914, and on May 19 in the present year, pursuant thereto notice was given of the present motion for condemnation. On July 16, with the consent of the Treasury Solicitor, an appearance was entered for Leonhardt & Blumberg, of Hamburg, as owners, and they were heard by their counsel upon the consideration of the motion, both at the original hearing on July 27 and upon a further argument which took place in vacation. No claim other than that of the owners was brought to hearing.

The *Marie Leonhardt* is in the custody of the Marshal. She is not within the terms of art. 244 of the Treaty of Versailles (Annexe III.) whereby German merchant ships of 1600 tons gross and upwards were absolutely ceded to the Allied and Associated Governments, and it did not appear that any action had been taken under art. 297 for vesting the property in her in the custodian nominated under the Treaty of Versailles Order, 1919, for the liquidation of German assets in the United Kingdom. The disposal of this vessel is therefore to be dealt with on the present motion.

The questions discussed upon the hearing of the motion were these:—Was there, at the outbreak of the war, a rule of international law whereby an enemy merchant ship

1920

THE MARIE LEONHARDT.

The President.

then found in the port of a belligerent was entitled to depart freely from such port, either immediately or after a reasonable number of days of grace? Was such a right prima facie conceded to German owners of shipping, either by Convention VI. of the Hague, or by diplomatic communications which took place on or after the outbreak of war? If, prima facie, the Convention or any diplomatic communications conceded such a right, was the concession abrogated, or were German nationals precluded from claiming any advantage thereunder by conduct of Germany during the war in systematic violation of the Convention and of other Conventions made at the Hague, and of the rules of international law with regard to warfare between civilized Powers?

The effect of Hague Convention VI. as well as of Proclamations made in 1914 by His Majesty's Government and that of Germany, and of diplomatic correspondence addressed by both Powers to neutral intermediaries, was discussed in some detail on the part of the Procurator-General, and affidavits of Sir John Paget Mellor and Sir Oswyn Murray were read, which set out in an appalling catalogue the horrors inflicted during the war by Germany upon belligerents and neutrals, combatants and non-combatants, by reason of which it was contended on the part of the Crown that German nationals must be held disentitled to any advantage from the adherence of Great Britain to Convention No. VI., or from any offers of the British Foreign Office at the outset of the war to extend such advantages under concessions to be mutually agreed.

At the original hearing I reserved judgment, and upon receiving later some copies of additional correspondence, I restored the case to the list for further argument. By reason of the course then taken on behalf of the claimants it is unnecessary that I should come to a decision upon any question other than the first of those I have already mentioned. Mr. Noad asserted no rights on their part under the Hague Convention or the diplomatic

1920

THE MARIE LEONHARDT.

The President.

correspondence, and said "the inquiry before the Court is entirely outside the Hague Convention" and "all matters subsequent to August 4, 1914, are irrelevant." He contended that at that date a custom had arisen of allowing to the merchant ships of belligerents found in enemy ports on the outbreak of war a period of time in which they are free from capture and may withdraw from enemy waters. The allowance of such an interval he asserted as a right the recognition of which is obligatory upon all civilized States. The seizure made in port was, he said, a wrongful seizure, and he claimed that the Court ought to exercise its inherent authority to rescind the decree made on October 1, 1914, in the claimants' absence, whereby the seizure was declared to be valid, and to treat the ship as property wrongfully detained within the jurisdiction of the Court, and consequently free from any possibility of British claims under the terms of the Treaty of Versailles. The decree of October 1, 1914, is no doubt under the control of the Court, and I intimated that I should not allow it to stand in the way of the claimants in the event of my coming to a conclusion in their favour on the main question.

The inquiry whether by international law a merchant ship of a belligerent found at the outbreak of hostilities in an enemy port is entitled to depart freely at once, or during a period of time to be allowed as days of grace, cannot in this Court be usefully carried beyond, in point of time, the decision in *Lindo* v. *Rodney* (1) in the Court of King's Bench, when Lord Mansfield stated the law in these concise words: "Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made." In the present case it is common ground that "no reciprocal agreement was made." Therefore, if the law remains as it was in Lord Mansfield's time, the claim of the Procurator-General for confiscation of this ship cannot be denied.

(1) 2 Doug. 614*n*.

1920

THE MARIE LEONHARDT.

The President.

The facts mainly relied upon in support of the case for the claimants were those incidental to the war between Great Britain and her Allies and Russia in 1854, the war between France and Germany in 1870, the war between Russia and Turkey in 1877, the war between the United States of America and Spain in 1898, and the war between Japan and Russia in 1904. The individual belligerents in each of these wars allowed to enemy merchantmen found in their ports when war broke out some opportunity for withdrawal. Russia in 1904 granted to Japanese vessels a period not exceeding forty-eight hours, whereas Japan granted to Russian vessels seven days. Spain in 1898 allowed to United States shipping five days, and the United States gave to Spanish shipping thirty days. Great Britain and France in 1854, France in 1870, and Russia in 1878 permitted enemy vessels to proceed without limiting the number of days to be allowed as necessary for clearance. This course of practice extending over sixty years before the war of 1914 was said to establish a custom or usage having the effect of law. Various statements of eminent jurists were also relied upon as evidence of general, if not universal, recognition of the alleged right.

Upon careful examination, I think the text-books which were referred to do not bear out the contention of the claimants. Mr. Hall (International Law, 7th ed., p. 477), for example, speaks of enemy vessels in the port of a belligerent as being "*occasionally* exempted from capture during a specified period," and Dr. Pearce Higgins (The Hague Peace Conferences, pp. 300, 301) adds to the statement he made that "a custom has arisen," particulars of varying, and in some cases nominal, concessions which show an absence of any certainty or uniformity in the conduct of the States by whom in modern wars the concessions relied upon have in fact been made. This is the comment which the facts suggest with regard to the most positive assertion of an existing rule of law which I have been able to find, that, namely, of Dr. John Bassett Moore in his International Law Digest, vol. vii., § 1196, p. 453.

1920

THE MARIE LEONHARDT.

The President.

"It was formerly the practice," says this learned writer, "not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that, if war should come, they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars."

Had the views of the modern text writers been definite and unanimous to the effect alleged on behalf of the claimants it would still be necessary to ascertain whether their conclusions were warranted by the facts. The practice of great States which were at war between 1854 and 1914 was of the varying kind I have described. What can in truth be said of it is that each of these States either allowed enemy shipping to depart or respited its liability to capture for a measurable period of time. Whether these concessions were recognitions of a right or were acts of grace seems to me to be the real question at issue. I am guided to the true answer to this inquiry by the proceedings at the Hague Conference of 1907 which led to the formulation of Convention VI., and, in a less degree, by the action of various States at the outbreak of war in 1914. The course of events at the Conference is sufficiently shown in Dr. Pearce Higgins' treatise (pp. 300–307), to which I have already referred. The question presented to the Committee of the Conference which dealt with the subject was in these terms: "Is it a rule of war on the opening of hostilities to detain and confiscate enemy merchant ships in the ports of one of the belligerent States? Should the vessels be recognised as having a right to leave freely, within a given fixed time, the ports in which they were at the commencement of war, with or without their cargoes?" The delegates of the Powers were at issue as to the existence of the suggested right of withdrawal, and Great Britain, France, Japan and the Argentine Republic voted against the proposal that days of grace should be made obligatory by agreement of the Powers. In the event a compromise was embodied in Convention VI., art. 1 of which is expressed in the words following: "When a merchant

ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated."

The conduct of the belligerent Powers on and after the outbreak of war on August 4, 1914, which is relevant to the inquiry whether, apart from Convention VI., there was in 1914 by common consent of civilized States the immunity from capture which is asserted on behalf of the present claimants, consists of a series of official acts and diplomatic communications. His Majesty's Government offered for enemy shipping leave to withdraw during days of grace, subject to reciprocal concessions by the enemy States. Austro-Hungary accepted the offer: Germany did not. The French Government took a like course with that of Great Britain. During August, September and October of 1914 diplomatic communications continued with the object of obtaining agreement between Great Britain and Germany of terms upon which ships and their crews should mutually be released, but no such agreement was arrived at. Nowhere does any assertion appear in the correspondence that leave to depart at the outbreak of war was a right, or that the detention of the ships or their crews was an abuse of belligerent power.

Giving all the weight I can give to the concessions made by belligerent Powers from 1854 to 1914, and the concurrence of numerous States in a desire to secure as a right under international law days of grace for enemy ships found in the ports of a belligerent at the outbreak of war, I find myself brought definitely to the conclusion that the law on this subject remained in 1914, and is now, as it was in the time of Lord Mansfield. Ships of the enemy in our ports at the declaration of war, or the outbreak of hostilities, are "detained in our ports to be confiscated if no reciprocal agreement is made."

1920

THE MARIE LEONHARDT.

The *Marie Leonhardt* is condemned as good and lawful Prize and droits and perquisites of His Majesty in His Office of Admiralty.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the Claimants: *Thomas Cooper & Co.*

E. C. M. T.

[ADMIRALTY.]

1920

July 26, 27, 30; *Oct.* 15.

THE ARUM.

Admiralty—Compulsory Pilotage—Gibraltar—Admiralty Waters—Order in Council of March 22, 1911, *providing for the Definition and Control of Admiralty Waters in Gibraltar—Regulations of* 1913—*Proclamation of Acting Governor of July* 30, 1914—*Pilotage Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 15 *and* 61.

By s. 15, sub-s. 1, of the Pilotage Act, 1913: "Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory." Sect. 61 provides that the Act shall extend to the United Kingdom and the Isle of Man.

By virtue of a general regulation applicable to the Admiralty waters of Gibraltar, pilotage was compulsory on the defendants' vessel which ran into and damaged the plaintiffs' vessel lying at the Detached Mole. The collision was solely due to the fault of the pilot put on board the defendants' vessel under the orders of the King's Harbour Master in order to shift her to another berth:—

Held, that as the Pilotage Act did not extend expressly or by necessary implication to Gibraltar, and as, by the ordinary common law, if sued in Gibraltar the defendants would not have been liable for the negligence of a pilot put on board their vessel by compulsion of law, the defence of compulsory pilotage succeeded.

Held, further, that the fact that the vessel was under the form of charterparty known as "T. 99" which contained a provision that "the Admiralty shall not be held responsible for losses sustained through the negligence of pilots . . . . or others employed by them, the owners recognising them as their servants even if appointed and paid by the Admiralty . . . . " did not make the pilot in fact the servant of the owners.

1920

THE ARUM.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Rossano;* the defendants were Swan, Hunter & Wigham Richardson, Ld., the owners of the steamship *Arum.*

By an amendment, T. W. Wollage, the pilot in charge of the *Arum,* was added as a defendant, but he died before the date of hearing.

The facts, so far as material, were that on August 23, 1918, the *Arum* was being moved by the pilot from the Gun Mole at Gibraltar to the Detached Mole when she took a sheer and struck the *Rossano* moored at the Detached Mole. There was nothing in the wind or the weather to cause the collision.

The defendants pleaded that the *Arum,* which was under requisition to the Admiralty under the terms of charterparty T. 99, was not in a fit trim to be under way as she had discharged a portion of her cargo of coal and was drawing five feet more forward than aft. The Admiralty officials in charge of the port, however, insisted upon her being shifted and the master of the *Arum* was compelled to obey the order. The defendants further pleaded that the *Arum* was moved despite the protests of her master, and that the pilot who shifted her was not their servant and they were not responsible for his navigation.

Hill J. in giving judgment on the facts said that the Elder Brethren advised him that it was not improper, having regard to the trim of the *Arum,* to attempt to move her, and that if properly handled the *Arum* ought to have avoided the *Rossano.* The collision was caused by the negligence of some one on board the *Arum* and his Lordship held that it was the negligence of the pilot alone. The question whether the owners of the *Arum* were liable for the pilot's negligence was reserved for further argument.

Bateson K.C. and *Stranger* for the plaintiffs. Although the defendants may have been compelled to take the pilot, he was merely put on board to advise the master : cf. *Taylor* v. *Burger.* (1) There is no evidence that the defendants did not

(1) (1898) 8 Asp. M. L. C. 364.

1920

THE ARUM.

voluntarily enter into the chartering agreement with the Admiralty ; and under the term of T. 99 the pilot became the defendants' servant and they cannot be heard to deny that relationship. Even if pilotage was compulsory on the *Arum* by reason of any of the regulations appertaining to the waters of Gibraltar, s. 15 of the Pilotage Act, 1913, applies and the defence of compulsory pilotage is no longer available : cf. *The Chyebassa* (1) where it was held that shipowners were liable for the negligent acts of a pilot compulsorily taken on board under the Defence of the Realm Regulations.

Langton and *Carpmael* (*Stephens K.C.* with them) for the defendants. This case is distinguishable from *The Chyebassa.* (1) The collision in that case took place in home waters, and the scope of the Pilotage Act, 1913, is limited to the waters surrounding the United Kingdom and the Isle of Man (s. 61). The ordinary rule of common law that a person is not liable for the negligent acts of some one who is not his servant applies in the case of a pilot compulsorily taken on board a vessel outside British home waters. The *Arum* was moved against the defendants' will by the executive act of an executive officer and the defendants, therefore, are not liable : see *The Penrith Castle* (2), and in particular the judgment of Scrutton L.J. who expressly left open the question of the defence at common law. In fact however pilotage was compulsory on the *Arum*, apart from the action of the executive, under an Order in Council of March 22, 1911, and the regulations made under a Proclamation of July 30, 1914 (set out in the judgment). By the common law of Gibraltar the defendants would have had a defence if sued there, and there is nothing in the Pilotage Act to deprive them of their common law defence : cf. *The Halley.* (3)

The agreement in the T. 99 charterparty that as between the defendants and the Admiralty the pilot shall be treated as the servant of the defendants does not make him their

(1) [1919] P. 201. (2) [1918] P. 142, 150.
(3) (1868) L. R. 2 P. C. 193.

servant in fact. Qua third parties he was not their servant as they had no control over him.

Balloch watched the proceedings for the Admiralty.

Stranger in reply. If there is a liability by English law the Court is bound to give effect to it: *The Halley* (1); s. 61 of the Pilotage Act does not provide that the Act shall "only" apply to the United Kingdom, and does not limit the effect of s. 15 which has general application.

Cur. adv. vult.

Oct. 15. HILL J. read the following judgment. I adjourned this case for further hearing on the question whether the owners of the *Arum* were answerable for the fault of the pilot in the navigation of the *Arum*. I have since received valuable assistance from counsel, assistance which leads me to a conclusion for which neither side contended in their main argument, though each had a secondary argument with which the conclusion fits. The conclusion is one which in some degree modifies, or rather amplifies, a view I have already expressed. I said: "It has not been proved that pilotage was compulsory by any general act or regulation. The compulsion was by the particular order of the Admiralty official, which order the master was compelled to obey."

A consideration of the Orders in Council, ordinances and regulations relating to Gibraltar, to which Mr. Langton referred me on the further argument, lead me to the conclusion that pilotage was compulsory upon the *Arum* by virtue of a general regulation applicable to the locality in which the *Arum* was being navigated at and before the time of the collision. The matter stands thus. By Order in Council of March 22, 1911, the Admiralty waters were defined. That Order in Council will be found in Consolidated Laws, 1913, vol. i., p. 469. The title of this order appears in the chronological table of vol. i. of the Consolidated Laws as: "An Order in Council placing certain water area at Gibraltar under the jurisdiction of the Lords Commissioners of the Admiralty." And in the same volume, at p. 469, it is

(1) (1868) L. R. 2 P. C. 193.

1920

THE ARUM.

Hill J.

headed: "Order in Council providing for the definition and control of Admiralty waters in Gibraltar." The Admiralty waters as therein defined include the whole space within the moles in which the *Arum* was on this occasion moving. By clause 2 of this Order in Council control over the Admiralty waters was vested in "the Senior Naval Officer at Gibraltar or in such person as may, by direction of the Lords Commissioners of the Admiralty, be performing the duties of King's Harbour Master." By clause 3 of that Order in Council power was given to the Senior Naval Officer or the person performing the duties of King's Harbour Master to make regulations in respect of the use, order and government of the Admiralty waters and of all ships and boats therein. By clause 4 the regulations had to be confirmed by the Lords Commissioners of Admiralty, and published in the *London Gazette* and *Gibraltar Official Gazette*. By clause 5 the masters of all merchant and other private vessels admitted to the Admiralty waters "shall be subject to the directions of the Senior Naval Officer at Gibraltar, or of the person performing the duties of King's Harbour Master, in all matters connected with anchoring, mooring, securing or shifting berth in those waters." By clause 14 a penalty is imposed upon any person contravening any rule or regulation in force under the Order. By regulations—"for the control of the Admiralty waters at Gibraltar as defined by Order in Council of the 22nd March, 1911"—which appear in vol. ii. of the Consolidated Laws, published 1913, p. 67, it is provided by clause 1 that: "No merchant or other private vessel shall enter, anchor, moor, or afterwards shift berth within the Admiralty waters without the permission of the King's Harbour Master [which term includes any person for the time being performing the duties of Harbour Master under the direction of the Senior Naval Officer], and no vessel having received such permission shall enter or move within the enclosed Harbour without obtaining the services of a qualified pilot or other authorised persons." Sect. 14 repeats the penalty for disobedience. Such are the laws at Gibraltar as regards the Admiralty waters.

1920

THE ARUM.

Hill J.

Over and above these are laws as to the port or waters of Gibraltar. In vol. i. of the Consolidated Laws at p. 433, will be found an ordinance, No. 2 of 1886, entitled: "To provide for the Regulation of all vessels navigating the waters of Gibraltar," etc. By clause 31 of that ordinance the Captain of the Port may appoint and license pilots for purposes of conducting ships within the waters of Gibraltar. By clause 33, the Governor may make rules for pilots. In the Laws of 1914 (p. 72) will be found a Proclamation by the Acting Governor of July 30, 1914. By para. 6 of that Proclamation pilotage is made compulsory for every vessel proceeding north of the Examination Anchorage. By para. 8: "after anchoring in the Commercial Anchorage no vessel shall shift her berth . . . . without having a pilot on board." By para. 20 pilotage is compulsory for all vessels leaving the port. By regulations which are entitled "Shipping Regulations Temporary" of September 6, 1915, made by the Governor (Laws of 1915, p. 68), the regulations made by the Proclamation of July 30, 1914, were to be deemed to be regulations made in pursuance of powers conferred by Order II., para. 3, of the Order in Council dated October 26, 1896, and published in the *Official Gazette* of August 6, 1914; and it was further provided by para. 2: "Where in the aforesaid Regulations compulsory pilotage is prescribed, the duty of the pilot shall be limited to indicating to the master of the vessel the place of anchorage (Regulations 6 and 8), or the course to be taken on leaving the port (Regulation 20), but the master of the vessel shall not by reason of such compulsory pilotage be relieved of his duties and responsibility as master." By Pilotage Rules of January 8, 1918, made under para. 33 of the Merchant Shipping Ordinance of 1886, rules were made for the examination, governance, fees and so forth of pilots (Laws of 1918, p. 123).

Thus we have a distinction between the port, or waters of Gibraltar, and that part of them which are "the Admiralty waters." The power to make regulations in the port is vested in the Governor. The power to make regulations with regard to the Admiralty waters is vested in the Senior Naval Officer

1920

THE ARUM.

Hill J.

or person performing the duties of King's Harbour Master. Whatever the effect of the ordinance of 1886 and the regulations of 1915 made by the Governor may be, the Admiralty waters and ships therein were at the date of the collision—that is, August 23, 1918—governed by the Order in Council of March 22, 1911, and the regulations made thereunder. The *Arum* was at all material times moving in the waters of the enclosed harbour within the meaning of the regulations. Under the penalty prescribed by the Order in Council of March 22, 1911, she might not move in those waters "without obtaining the services of a qualified pilot or other authorised person." The pilot was therefore on board by compulsion of law.

The *Arum* being under a penalty, bound to take on board a pilot, and to use his services, I adopt what I said in *The Andoni* (1), and hold that, in the absence of evidence to the contrary, the pilot was entitled, and the master was bound, to permit him to take charge of the navigation of the ship. The evidence does not weaken, it confirms that view. I therefore hold that the ship was being navigated, or, in the language of s. 15, sub-s. 1, of the Pilotage Act, 1913, was navigating under circumstances in which pilotage was compulsory.

That brings me to s. 15, sub-s. 1, of the Pilotage Act, 1913, and s. 61 of that Act in connection therewith. As appears from the language of s. 15, sub-s. 2, s. 15 was enacted to enable His Majesty to comply with an International Convention. By art. 5 of the International Convention of September 23, 1910: "The liability imposed by the preceding articles attaches in cases where the collision is caused by the fault of a pilot even when the pilot is carried by compulsion of law." Sect. 15 of the Pilotage Act, 1913, is in the following terms: "(1.) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which the pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage

(1) [1918] P. 14, 18.

1920

THE ARUM.

Hill J.

were not compulsory." "(2.) This section shall not take effect until the first day of January, 1918, or such earlier date as His Majesty may fix by Order in Council, certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention." "(3.) As from the date of the coming into operation of this section, s. 633 of the Merchant Shipping Act, 1894, shall cease to have effect."

The immunity of a shipowner for the acts of a compulsory pilot did not depend only on s. 633 of the Merchant Shipping Act of 1894. It was an immunity depending on the principles of the common law. Beyond question s. 15, sub-s. 1, destroys that immunity in some cases, and in effect, provides, that, though the pilot is not the servant of the shipowner, the shipowner is to be liable as if the pilot were his servant. Does it apply in the present case? Mr. Langton contends that it does not. He says first, that by s. 61 of the Pilotage Act the application of s. 15, as of all the other sections of the Act, is confined to the United Kingdom and the Isle of Man, and that s. 15 has no application to a vessel or to the owner of a vessel being navigated at Gibraltar. He says secondly, that there is no proof of any law of Gibraltar whereby a shipowner is made answerable for the fault of a compulsory pilot; but that on the contrary the common law of this country must be presumed to rule there and that the shipowner cannot be made liable in tort unless he is liable both by the law of this country and by the law of the place where the tort was committed. This latter argument of course proceeds on the ground that the collision did not happen on the high seas, but in the territorial waters of Gibraltar. It is based on the contention that while s. 15 may alter the common law of the United Kingdom it does not alter the common law of Gibraltar.

If the first argument is sound, if the effect of s. 61 is to confine the operation of s. 15 to collisions happening in the United Kingdom by the negligence of a pilot compulsorily in charge by the law of the United Kingdom, then the Legislature which manifestly intended to give effect to the

1920

THE ARUM.

Hill J.

International Convention, has signally failed to do so, and cases like *The Halley* (1) are still the law of England. If the second argument is sound, it is consistent with the view that the Legislature has succeeded in abolishing the defence of compulsory pilotage if the collision is in the United Kingdom or on the high seas or in the territorial waters of any country by the law of which the defence is not admitted, but has not taken away the defence in an action in the United Kingdom in respect of a collision in the territorial waters of any country by the law of which the shipowner is not liable for the negligence of a pilot compulsorily in charge of his ship.

I see no answer to this second argument, and as that is sufficient to make good the defendants' answer to the plaintiffs' contentions based upon s. 15, I need not decide upon the first argument.

My reasons are as follows: The collision occurred in the enclosed harbour of Gibraltar and not on the high seas. I can see no reason for thinking that at Gibraltar a shipowner is liable for the negligence of a compulsory pilot—i.e., for a pilot who is not his servant. By Order in Council of February 2, 1884, which appears in vol. i. of the Laws, p. 3: "Except in respect of matters which now are or hereafter may be provided for by any Order in Council or local ordinance for the time being in force in Gibraltar, or by any Act of Parliament *expressly or by necessary inference* extending to Gibraltar, or by any Proclamation or other instrument issued under the authority of such Order in Council, local Ordinance or Act of Parliament, the law of England, as it existed on the 31st day of December, 1883, shall be hereafter in force in Gibraltar so far as it may be applicable to the circumstances thereof." The Pilotage Act, 1913, does not either expressly or by necessary inference extend to Gibraltar. On the contrary, as far as it deals with this question at all, s. 61 provides that it shall extend to the United Kingdom, and the Isle of Man. If the owners of the *Arum* had been sued in respect of the collision in the Courts

(1) L. R. 2 P. C. 193.

1920

THE ARUM.

Hill J.

of Gibraltar, there would have been no answer to the defence that the collision was caused by the negligence of a person who was not the owner's servant. The tort of which the plaintiffs complain was one which did not create a cause of action against the defendants by the law of the place where the tort was committed. How then does the Pilotage Act make it a cause of action against the defendants in this country? Before the Pilotage Act the defendants could have pleaded: (1.) "We are not liable by the law of the United Kingdom for the negligence of a compulsory pilot who is not our servant," and (2.) "we are not liable by the law of Gibraltar for such negligence." Either defence, if made good, would have been an answer to an action in these Courts for negligence committed in the enclosed waters of Gibraltar. Conceding that the effect of the Pilotage Act is that the defendants can no longer set up the first defence, they can still set up the second.

I hold that the defendants are not made liable by s. 15 of the Pilotage Act.

The plaintiffs had another contention, quite apart from the Pilotage Act. They contended that the pilot was in fact the servant of the owners. This argument was based on clause 22 of the charterparty, T. 99 form, under which the *Arum* was at the time chartered to the Admiralty. Clause 22 is as follows: "The master shall obey all orders and instructions which he may receive from the Admiralty, or from any Officer authorised by them" and so forth; and then: "The Admiralty shall not be held responsible for losses sustained through the negligence of pilots, tugboats, stevedores, or others employed by them the owners recognising them as their servants even if appointed and paid by the Admiralty or the agents of the Admiralty." In my judgment nothing in this clause makes the pilot the servant in fact of the owners. As between owners and charterers, the owners undertake that the master shall be responsible and that they will recognise pilots, etc., as their servants. But, as against the public, the Court must look at the real facts. The pilot was in charge of compulsion of law. The root test of the

1920

THE ARUM.

Hill J.

relationship of master and servant—namely, the right to control—was entirely absent.

I therefore give judgment for the defendants, the owners of the *Arum*, on the ground of compulsory pilotage with costs. The action against the other defendant was abated.

Solicitors for the plaintiffs: *Downing, Handcock, Middleton & Lewis.*

Solicitor for the Admiralty: *The Treasury Solicitor.*

Solicitors for the defendants: *Waltons & Co.*

E. C. M. T.

[ADMIRALTY.]

1920

Oct. 28.

THE TOLLA.

Admiralty—Foreign Vessel—Necessaries—Action in rem—Master's Authority to pledge Owner's Credit—Vessel under Time Charter.

The plaintiffs, steamship brokers of Newcastle and Sunderland, at the request of the master of a Norwegian vessel made various disbursements on behalf of the vessel. The plaintiffs were not aware that the vessel was under time charter until they had made the disbursements when the master told them to send the accounts to the time charterer. The plaintiffs did so, and failing to receive payment brought an action in rem against the vessel:—

Held, that the master had authority to pledge the owners' credit, and that even if the master had told the plaintiffs that his vessel was under time charter it would not affect the owners' liability in rem unless he also told the plaintiffs that under the terms of the charterparty the expenses in respect of which the disbursements were made were payable by the charterer and not by the owners.

CONSOLIDATED ACTIONS IN REM for necessaries.

The plaintiffs, Speeding, Marshall & Co. and Cuthbert Wilkinson & Co., were steamship brokers carrying on business at Newcastle and Sunderland respectively. The defendants were the owners of the Norwegian motor vessel *Tolla*.

According to the statements of claim the plaintiffs in September and October, 1919, at the request of the master of the *Tolla* made a number of payments and disbursements

1920

THE TOLLA.

for necessary expenses incurred in the respective ports and to enable the vessel to prosecute her voyage. The plaintiffs alleged that the sums due to them, amounting to 210*l.* 6*s.* 6*d.* and 155*l.* 19*s.* 10*d.* respectively, were paid and disbursed on the security of the vessel and not on the personal security of the master.

According to the defence the *Tolla* was, as the plaintiffs well knew, chartered by the defendants to one Lars Steen of Trondhjem, and under the provisions of the charterparty, which were also known to the plaintiffs, the expenses in respect of which the disbursements were made fell upon the charterer; and the defendants alleged that the plaintiffs made the payments on behalf of Lars Steen and not on the security of the vessel.

At the hearing the plaintiffs gave evidence that it was not until after they had made the disbursements that they were told the vessel was under time charter and that the accounts should be sent to Lars Steen. The plaintiffs sent the accounts to Steen but they received no reply to their communications.

E. Aylmer Digby for the plaintiffs.

Langton for the defendants.

[The arguments were mainly directed to the facts. It was contended for the plaintiffs that the master of the *Tolla* had not informed them that the vessel was under time charter and that under its provisions the advances asked for fell to be paid by the charterer; and that the plaintiffs made the advances on the credit of the vessel, and *The Great Eastern* (1) and *The Wellgunde* (2) were referred to. It was contended on behalf of the defendants that the master disclosed the fact that the vessel was under time charter, and that although he did not disclose the terms of the charter the plaintiffs were put upon inquiry, and that, after failing to obtain repayment from the charterer, they could not be heard to say that the advances were made on the credit of the vessel.]

(1) (1868) L. R. 2 A. & E. 88. (2) (1902) 18 Times L. R. 719.

1920

THE TOLLA.

HILL J. This is a claim for necessaries in rem against a Norwegian ship, and the only question is whether the master had actual or apparent authority to pledge the credit of his owners. Unless there is a liability on the part of the owners there cannot be a remedy in rem against the ship. The defence is that the ship was under a time charter under which the greater part of the expenditure represented by these disbursements fell to the charge of the time charterer and not to the owners, and that the plaintiffs at the time they made the disbursements were aware of the time charter or of the fact that there was a time charter sufficiently to deprive them of the right to say that the master had apparent authority to pledge the owners' credit.

There has been a conflict of evidence precisely as to what was told by the master to Messrs. Speeding, Marshall & Co. on the one hand and Messrs. Cuthbert Wilkinson on the other. The master in my view, if I accept his evidence in the full, does not prove enough to support the defence, because all he says is: "I told these ship brokers that I had an owner and that I had a time charter. I never showed them the time charter, and that is the position at the time the liabilities were incurred." In that there is nothing in my view, supposing it to be true, which would take away from the master, vis-a-vis the plaintiffs, his apparent authority to pledge the owners' credit, because the mere fact that there is a time charter does not by itself affect the master's apparent authority to pledge the owners' credit. By the terms of the charter it might be that the whole of the expenses fell to the charge of the owners. I would add that the fact that afterwards when the liabilities had all been incurred the name of the charterer was given with a request that the accounts should be sent to him is to my mind quite immaterial; it cannot affect liabilities which had already come into existence. I think therefore that if I accepted all the evidence given for the defendants they would not make out their defence. But I am not prepared to accept it. The master has given his evidence I have no doubt very fairly to the best of his recollection, but it is a long time ago. I have had the

1920

THE TOLLA

Hill J.

gentlemen from the plaintiffs' firm before me and I accept their evidence; I see no reason to doubt that they did not even know at the time they incurred these expenses that there was a time charter at all. I therefore give judgment for the plaintiffs for the amounts claimed.

Solicitors for the plaintiffs: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for the defendants: *Botterell & Roche.*

E. C. M. T.

Discussed. FEARN v. FEARN. [1948] P. 141

[IN THE COURT OF APPEAL.]

1920

Jan. 28.

C. A.

Nov. 29.

CROCKER *v.* CROCKER.

Divorce—Condonation—Forgiveness by Letter—Reinstatement of Wife—Agreement not to sue.

A mere forgiveness by a husband of a guilty wife, whether expressed verbally or by letter, without restoration of the wife to her former position, cannot amount to condonation.

So held by the Court of Appeal, affirming the decision of Sir Henry Duke P.

Keats v. *Keats* (1859) 1 Sw. & Tr. 334 approved and followed.

A husband whose wife had been guilty of adultery wrote to her a conditional letter of forgiveness. In answer the wife wrote a letter in which she accepted without qualifications his offer of forgiveness. On receiving the husband's letter the wife refused an offer of a place in domestic service which she had intended to accept. The husband subsequently withdrew his offer and filed his petition for divorce:—

Held (affirming the decision of Sir Henry Duke P.), that the two letters taken together did not constitute an agreement binding the husband not to take proceedings for divorce.

THE husband was a soldier and on May 6, 1918, whilst on active service in France his wife gave birth to a child, the result of an adulterous intimacy with a man unknown. The facts of the wife's misconduct became known to the husband, and correspondence passed between the parties upon the footing that the wife had been guilty of adultery and that the husband had renounced her in her capacity as his wife. The children had been taken away from her. At the time of the material letters the husband knew all the facts of the

C. A. 1920

CROCKER v. CROCKER.

case. In July, 1918, he received an affectionate letter from one of their children and other letters from other persons as well as his wife, and on July 11, 1918, he wrote the letter which was relied on in this case. In it he said: "I will come to you and forget everything if you promise you never do such a bad deed again. Well you say I have cut you off without a penny. I have not only the kiddies and the shilling I have been allowing you since I have been out here; that's all. I have not stopped yours at all: if it is stopped, it is a mistake. Well I will write to Mrs. Horton and Miss Grew if we can come to some arrangement. I will stop the lawyer if you forgive as you have I know. as it has been the shock I have had in my life. . . . . Of course you must please yourself for the best and the children. If you promise to do what is right I will forget everything and start a fresh life and I hope for the best."

In answer to this letter the wife wrote on July 14, 1918, the letter which was relied on on her behalf, in which she unconditionally accepted the proposal made by her husband. In it she said: "I have received your letter this morning and if you only knew the pleasure it has given me to have a nice letter from you again and that you will make further try you shall never regret it if I can help it and I will try to show you all my life how sorry I am for what I did and to atone for it."

Between the writing of the letter of July 11 and the receipt of his wife's answer the husband received a letter from his father, not containing any charges against the wife which the husband did not know of, but showing that his family took a different view from his own as to the possibility of a reconciliation with his wife. On receipt of this letter the husband wrote and informed his wife that he would have nothing more to do with her, and on March 10, 1919, filed the present petition for divorce.

It appeared that the wife had received an offer of a place in domestic service from Miss Grew which she had intended to accept, but had refused after receiving her husband's letter of reconciliation.

The petition was heard before Sir Henry Duke P. on January 28, 1920.

G. C. Tyndale for the petitioner.
Humphrey Paul for the respondent.

SIR HENRY DUKE P. [after stating the facts]. That is the state of facts upon which the question of condonation arises. There was a subsidiary question: there was an allegation that the husband's letter of July 11, 1918, had been written without knowledge of the material facts. I have heard what the material facts are which, it is said, ought to deprive this letter of its natural effect, and I find to the contrary upon that contention. The husband, when he wrote his letter, had knowledge of the whole of such facts as were necessary for the purpose of coming to a decision upon the subject. In that state of facts it is said that the letters show forgiveness and that the determination to forgive a matrimonial offence, followed by a communication of that determination to the offending party, amounts to condonation. It is said also that the letters amount to an agreement and that the agreement is an agreement in effect not to proceed to sue for a divorce in respect of an admitted matrimonial offence. The questions are separate questions.

In my judgment I am bound by the decision in *Keats* v. *Keats* (1), a decision of the Court of Appeal in divorce, that is, of the full Court constituted under the Matrimonial Causes Act, 1857, to hold that a determination to forgive, followed by communication of that determination to the offending spouse, does not amount to condonation. The question is very fully discussed in *Keats* v. *Keats*. (1) It is discussed by learned counsel who had very great experience of the practice of the Ecclesiastical Courts, and it was the subject of decision by the Judge Ordinary and decision by the full Court. It is said that the decision in *Keats* v. *Keats* (1) is not in point in this case; and that the passages in the judgment in *Keats* v. *Keats* (1), which are relied upon on behalf

(1) 1 Sw. & Tr. 334.

C. A. 1920

CROCKER v. CROCKER.

The President.

of the petitioner here, are not of authority, and that the expressions of opinion by Lord Chelmsford L.C. and the other members of the full Court were dicta. In my opinion they were parts of the reasons for the decision of the case and were material to the decision in the case. The question was whether the learned judge had directed the jury correctly. In his statement of the law with regard to condonation he said (1): "Condonation means a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed." Another part of the direction was this (2): "I do not mean to say that condonation may not be by words, because if my view of condonation be right, the act of the person condoning intending by that condonation to restore the offending party to her original position, may be manifested by words. Certain acts are sufficient in themselves to prove condonation, but the party may express his intention in writing, or he may say in terms: 'I do so and so.'" The question being whether the direction to the jury was sound in point of law, Lord Chelmsford, in delivering the leading judgment in the case, defined condonation. I cannot doubt that it was necessary for the judgment of the Court in that case to define condonation. Lord Chelmsford said this (3): "But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete." Lord Chelmsford also said this (4): "I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary." That judgment was emphasised in the case of *Bernstein* v. *Bernstein* (5) in the present Court

(1) 1 Sw. & Tr. 346.
(2) 1 Sw. & Tr. 334, 347.
(3) 1 Sw. & Tr. 334, 356.
(4) 1 Sw. & Tr. 334, 357.
(5) [1893] P. 292.

of Appeal, where reference was made in the course of the argument to this, that in order to show condonation there must be proved forgiveness followed by cohabitation. I do not pause to consider that second statement of the law in detail. In my judgment that passage was not necessary to the decision in *Bernstein* v. *Bernstein* (1), and the statement of the law by which I feel myself bound in this matter is the statement in *Keats* v. *Keats*. (2)

It appears to me, therefore, that I have to ascertain in this case whether, first, there was a determination to forgive communicated to the wife; and, secondly, whether there was a restoration of the wife to her position as wife. It has been stated that proof of sexual intercourse is not necessary, and that you may not safely define the specific acts which amount to restitution of the wife to her position as a wife, but that there must be more than the declaration of a state of mind and more than a declaration of an intention. That results from *Keats* v. *Keats*. (2) Forgiveness in the moral sense was undoubtedly offered by the letter of July 11. It appears to me that the husband, under the stress of the natural emotions of a man faced day by day with the imminent prospect of death, and with the feelings of a father for his children, had resolved definitely that he would forgive this very grave offence. That seems to me to follow from his letter. There was a condition, as a promise of future good conduct, and the condition was accepted.

If it were my opinion that I were at liberty to hold that forgiveness could release a guilty wife from the consequences of her conduct, I should consider myself warranted in so holding, and I should so hold in this case. The question is whether I am at liberty so to hold.

In that view of the matter I have to consider whether what has taken place here is the restoration of the wife to the status of a wife, to her duties and conjugal rights as a wife upon the footing of forgiveness. I must examine the position of the parties. What had happened upon the discovery of the unhappy misconduct of the wife was the deprivation of her

(1) [1893] P. 292. (2) 1 Sw. & Tr. 334.

C. A. 1920

CROCKER v. CROCKER.

The President.

allowances as a wife and the withdrawal from her care of the children of the marriage, and perhaps those are the material facts in this case. Was anything done to alter that situation, and, in respect of either of those particulars, to restore the respondent to her status? Nothing was done. The wife remained as she was, and so far as restoration of the wife to her status as a wife is concerned, I think the true conclusion is that the husband, who had promised so to restore her, upon the representations of members of his family, altered his mind. So I come to the conclusion upon the first proposition—namely, that the letters operated to effect condonation, that there is no condonation in this case.

With regard to the second proposition that there was an agreement here which deprived the husband of the right to present his suit, the case to my mind is not at all free from difficulty. I have doubt as to whether the conduct of the wife upon the receipt of the husband's letter might be said to be action on her part, founded upon the acceptance of her husband's letter, by which she changed her situation. But I am bound to consider this matter as a dry question of law. It seems to me that I am not able to say that there is in this case evidence of consideration moving from the wife to support the allegation of a concluded agreement whereby the husband's right to maintain divorce proceedings can be barred. I think that alleged agreement fails for want of consideration. The words of acceptance by the wife and her promise as to her future conduct are mere promises which do not amount to consideration. So far as regards the action of the wife it was conduct which was suspended at such a period that it cannot be said that the wife's condition was changed. In that state of the case I think the allegation of an agreement not to institute these proceedings also fails.

The result is that in my judgment the plea of condonation in this suit fails and the husband is entitled to the decree nisi which he claims, but I say this further, that the case is one of difficulty and delicacy and in my mind is well worthy of consideration, because it raises the question which was

not decided in *Keats* v. *Keats* (1)—namely, whether there is a principle of English law that an interchange of letters of mutual promises between husband and wife in a matrimonial quarrel may under any circumstances be proof of condonation, so as to bar the right of the husband to relief in respect of his wife's adultery.

J. R. B.

The respondent appealed. The appeal was heard on November 26, 29, 1920.

Humphrey Paul for the respondent. On the facts it is submitted: (1.) If there has been no reinstatement of the wife, there is a binding contract on the part of the husband not to take divorce proceedings. (2.) If there has been a reinstatement, there has been condonation. (3.) Whether there has been reinstatement or not, the husband has been reconciled to the wife by express words, and such express verbal reconciliation amounts to condonation at law.

(1.) In considering the question whether there was a contract not to take divorce proceedings regard must be had to the position of the parties at the time the husband wrote the letter of July 11, 1918. The husband had repudiated the respondent as his wife and by that repudiation had lost a right, that is, a right to his wife's body for sexual ends: *Cramp* v. *Cramp*. (2) On the other hand the wife had acquired the right to lead her own life without any direction from the husband. He could not therefore prevent her from going out to service. It is submitted that the letter of July 11, 1918, was a clear offer by the husband to the wife to reinstate her which she was at liberty to accept or refuse as she pleased. The offer thus made was accepted by the wife by her letter of July 14, 1918, and the husband was thereupon bound.

(2.) If there was reinstatement there was condonation. When the husband wrote the letter of July 11 and she accepted its terms she was in fact reinstated. In the face of that letter it cannot be contended that the husband had

(1) 1 Sw. & Tr. 334. (2) [1920] P. 158, 170.

C. A. 1920

CROCKER v. CROCKER.

stopped his wife's separation allowance. The fact that he did not restore the custody of the children to her is not conclusive against reinstatement. The writing by the husband to Mrs. Horton is strong evidence of reinstatement.

(3.) There can be condonation by express words. It is clear on the facts that there were express words of reconciliation and it is submitted that they amounted in law to condonation. The Matrimonial Causes Act, 1857, affords little assistance as to the meaning of the term "condonation," except in s. 22. That section provides that "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." The section would at first sight appear to have no application to a suit for dissolution of marriage, but it is submitted that the word "condonation" cannot have one meaning when used with reference to a suit for judicial separation and another when used with reference to a suit for dissolution of marriage. The Ecclesiastical Courts followed the Canon Law: *Moss* v. *Moss*. (1) Condonation may be either express or implied: *Beeby* v. *Beeby*. (2) There is no inconsistency between what Lord Stowell said in that case and in *Dance* v. *Dance*. (3) It is clear that he was there dealing with a case of implied condonation and his remarks must be confined to such a case. In *Fairlie* v. *Fairlie* (4) Lord Eldon distinguished between express and implied condonation: see also *Snow* v. *Snow*. (5) It is submitted that the two letters of July 11 and 14, 1918, taken together amount to express verbal condonation.

[WARRINGTON L.J. What is the element in addition to forgiveness that is necessary to constitute condonation?]

(1) [1916] P. 155.
(2) (1799) 1 Hagg. Ecc. 789, 793.
(3) (1799) 1 Hagg. Ecc. 794*n*.
(4) (1815) 6 Paton, 121, 127.
(5) (1842) 2 Notes of Cases, Sup. xii.

Forgiveness legally releasing the injury: *Beeby* v. *Beeby*. (1) All condonation is conditional. In Ayliffe's Parergon Juris Canonici Anglicani, p. 226, it is stated: "There are five cases wherein a divorce cannot be made on the account of adultery. . . . . Fifthly, If the husband has reconcil'd himself to her after the adultery committed by her, or knowingly retains her after she has committed adultery." The dicta of Dr. Lushington in *Campbell* v. *Campbell* (2) are said to be inconsistent with the view that there can be condonation by words alone; but if those dicta are carefully read it will be seen that he was there considering a case of implied condonation. He had no idea there of laying down a principle applicable to condonation generally.

There is no case to be found in the reports, except the present, where, verbal condonation having been established, the Court has held that there was no condonation. It is submitted that dicta of Sir Cresswell Creswell in *Dent* v. *Dent* (3), Lindley L.J. in *Hall* v. *Hall* (4), and Lord Watson in *Collins* v. *Collins* (5) establish the proposition that condonation is of two kinds—express and implied—and that is the law at the present day. That is the law in Scotland: Fraser on Husband and Wife, 2nd ed., vol. ii., p. 1176, and as both the law of Scotland and that of England in this respect are founded on the Canon Law there can be no divergence between them. In *Keats* v. *Keats* (6) the Court had no power to override the decisions of the Ecclesiastical Courts. If they were in point when that case was decided they are so now. If the present appeal is decided in favour of the wife there would be no conflict between the decision in this case and that in *Keats* v. *Keats*. (7) In the latter case the Lord Chancellor was dealing with words which did not amount to complete forgiveness.

[LORD STERNDALE M.R. You may take it that that case

(1) 1 Hagg. Ecc. 789, 793.
(2) (1856) Deane's Ecc. Cas. 285.
(3) (1865) 4 Sw. & Tr. 105, 107.
(4) (1891) 60 L. J. (P. & M.) 73, 74.
(5) (1884) 9 App. Cas. 205, 257.
(6) 1 Sw. & Tr. 334.
(7) 1 Sw. & Tr. 334, 337.

C. A. 1920

CROCKER v. CROCKER.

is not binding upon us; but it is sixty years old and has constantly been acted upon in this Court.]

G. C. Tyndale and *W. Latey* for the petitioner were not called upon to argue.

LORD STERNDALE M.R. Mr. Paul has made a very gallant fight in this case, but, to my mind, his contention is very much the same as that put forward and rejected in *Keats* v. *Keats* (1), because it is said that if there be forgiveness it is sufficient to amount to condonation, although there be no restitution of the guilty party to his or her previous position. It was the summing up of the learned Judge Ordinary that was there in question; and Dr. Phillimore, in moving for a new trial, said, in a passage which I have already read (2) during the argument, "As to misdirection. The definition given by the Judge Ordinary to the jury of condonation is incorrect, and if incorrect, there must be a new trial. He defined it as 'a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed.' The part of the definition sought to be impugned is that which makes the restoration of the offending party to his or her former position indispensable to condonation. This doctrine is novel to our matrimonial law, is inconsistent with the established principles of condonation as recognised in our Ecclesiastical Courts, and, if admitted, would lead to mischievous consequences." There is no doubt whatever that the exception taken to the learned judge's direction was on the ground that the principle stated in it was not in any way dependent upon the actual facts of the particular case. Upon that the full Court, in a judgment delivered by the Lord Chancellor, Lord Chelmsford, held that the direction was right; and I do not think it necessary to read the judgment, which is somewhat long. They took the exception which I have read and discussed it, and came to the conclusion that there was no objection that could be taken validly to the learned Judge Ordinary's summing up, that is to say, they

(1) 1 Sw. & Tr. 334. (2) 1 Sw. & Tr. 334, 348.

held that those last words, "so as to restore the offending party to the same position as he or she occupied before the offence was committed," were necessary or proper words to express the elements required to constitute condonation; and I notice that Lord Chelmsford in his judgment used this language (1): "I am willing to adopt an expression which was happily used by Wightman J. in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by 'conjugal cohabitation.' This is clearly the opinion of Dr. Lushington in the case of *Campbell* v. *Campbell*. (2) To say that condonation requires conjugal cohabitation or connubial intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties." I take it that the Lord Chancellor there meant not that he adopted a meaning of "conjugal cohabitation" which necessarily involved sexual intercourse, but that he meant the resumption of conjugal cohabitation in such a way as, using the words of the Judge Ordinary, "would restore the offending party to the same position as he or she occupied before the offence was committed." That decision was given in 1859, and is, therefore, over sixty years old; and, so far as I know, it has never been questioned. There is more than one case in the Court of Appeal in which it has been mentioned and approved. There was the case of *Hall* v. *Hall* (3) to which we were referred; and there is the case of *Bernstein* v. *Bernstein* (4), to which the learned President refers in his judgment. On what grounds are we to say that that definition is wrong? It seems to me that it is quite impossible to say it is wrong, especially when we are told, whatever you may imply or seek to imply from dicta in the Ecclesiastical Courts, most of which were before the Court in *Keats* v. *Keats* (5), that there still is no case in which the exception to the Judge Ordinary's direction has been upheld; that is to say, there is no case in which it has been held that a mere forgiveness in words is sufficient to

(1) 1 Sw. & Tr. 334, 357.
(2) Deane Ecc. Cas. 288.
(3) 60 L. J. (P. & M.) 73.
(4) [1893] P. 292.
(5) 1 Sw. & Tr. 334.

C. A. 1920

CROCKER v. CROCKER.

Lord Sterndale M.R.

amount to condonation. Having said that, the principles to be applied to this particular case seem clear.

On the facts of this case I do not take quite such a favourable view of the wife's conduct as was taken by the learned President. The husband was a soldier on active service. While he was away his wife committed adultery, with the result that she had a child of which he was not the father. He wrote two letters to her. The first one I do not think I need trouble to read, as it is not the one which is relied on as constituting condonation. He then wrote the letter of July 11, which, coupled with her alleged acceptance of the terms mentioned in it, is relied on as condonation. He had also received letters from his son, which no doubt worked upon his mind and his affections, and helped to induce him to write the letter. [His Lordship read the letter of July 11 and continued:] It is quite clear from that letter that the husband was willing not only to forgive his wife and to take her back again, but he was even willing to take charge of her illegitimate child; but the offer in the letter is conditional: it is all "If you will do" so and so; "if you will promise not to do such a bad thing again"; "if you will do this"; "if you will do that I will forgive you and I will stop the proceedings"; or, at any rate, he says: "I am willing to stop the proceedings." She writes in answer to that a long letter of July 14, in which she says that she will do what he wishes; but before he received that letter, apparently he had received letters from his relations, and he had written another letter to her in which he refused to have anything more to do with her. It is said that upon those letters there is condonation; but in my opinion they do not constitute condonation at all. The husband is there expressing his willingness to take his wife back again subject to a number of conditions, practically all of which she in her letter of July 14 accepts; but the children were never brought back to her; the allowance and the allotment of payment were never restored to her; and she certainly was not, and could not by those letters alone be restored to her former position. I do not think it is necessary for me, any more than the Judge

Ordinary in *Keats* v. *Keats* (1) thought it was necessary for him, to say whether the mind of man could possibly devise a form of reconciliation in words which would restore a guilty spouse to his or her former position; it is difficult to imagine, but it is quite enough to say that, in my opinion, these letters do nothing of the kind. The wife was not in any way restored to her position; and therefore, to my mind, the President was quite right in saying, on the authority of the decisions as they stand, that there was no condonation in this case.

Then there is a second point raised in the case, and that is this. It is said that the letters, read together, constitute a binding agreement by the husband not to take divorce proceedings, if such an agreement can be made. In my opinion there is no ground for that statement. The parties did not think they were making an agreement; they did not try to make an agreement in the sense of a binding contract on which either of them could sue; such a thing never entered their minds. Besides, when you look at the letters, I think it is right to say that there is no consideration moving from the wife; and the terms of the letters do not constitute anything like a binding agreement. I think, therefore, that the appeal fails on both points, and must be dismissed with such costs as are applicable to a 'poor person's case.

WARRINGTON L.J. I so entirely agree with the judgments of the President and the Master of the Rolls that I do not think it necessary to add anything.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitor for respondent: *William Drake.*

Solicitors for petitioner: *Lovell, Son & Pitfield, for F. A. Johns, Bournemouth.*

(1) 1 Sw. & Tr. 334.

W. I. C.

1920
Nov. 10, 11, 16.

ADMIRALTY.

(In Prize.)

THE LISA.

Prize Court—Charterparty—Transit Licence—British Government's refusal to allow Cargo to be carried to Port of Destination—Detention of Ship—Liability of Charterers to Shipowners.

In April, 1915, a Swedish vessel was chartered by a British firm to load a cargo of rosin at Pensacola, destined for a British firm in Petrograd. The charterparty provided that the vessel was to proceed to Kirkwall for orders, and that the cargo was to be discharged at Narvik, Trondhjem, or Bergen. On the vessel's arrival at Kirkwall on June 13, 1915, the charterers ordered her to proceed to Narvik, whence it was intended that the cargo should be carried overland through Sweden to Petrograd. In April and May, 1915, there were export regulations in force in Sweden forbidding the export of rosin except under licence, and on May 20 further regulations came into operation whereby licences were required for the transit of rosin through Sweden. At that time the Swedish Government were not readily granting licences for transit to Russia, and His Majesty's Government declined to allow the vessel to proceed to Narvik unless transit licences were obtained, inasmuch as quantities of goods for which transit licences were refused eventually found their way to Germany. His Majesty's Government offered to allow the vessel to proceed to Archangel with the cargo, but the shipowners and charterers failed to come to terms, and ultimately, on September 15, the cargo was seized as prize and discharged at Leith. It was shortly afterwards released, and, a permit having been procured, was sent on to Petrograd in another vessel.

The shipowners issued a writ in prize against the charterers and against His Majesty's Procurator-General, claiming against them alternatively damages in respect of the detention of the vessel, and against the charterers a declaration that (inter alia) the plaintiffs were entitled to discharge the cargo as on a forced determination of the voyage due to the disability of the cargo. Subsequently the action, as against His Majesty's Procurator-General, was discontinued. As against the charterers, the plaintiffs contended (inter alia) that the goods unprovided with a transit licence were dangerous goods, in that the absence of the licence would inevitably result in the detention of the ship with the goods on board, and that there was a warranty or implied agreement by the defendants against the existence of an exceptional risk of this description:—

Held, that the risk of stoppage lay in the fact that His Majesty's Government, in the exercise of its belligerent rights, might detain the vessel under the law of prize, and was not due to a concealed danger in the nature of the goods; that each party was as well aware of this risk as the other; and that there was no warranty or implied agreement against it.

1920

THE LISA.

Held further, however, on the facts, that as it appeared that the charterers, instead of abstaining from doing anything which would lengthen the voyage of the vessel, had procured her continued detention whilst they were endeavouring to obtain a transit licence, they were liable for a portion of the delay, which the Court estimated at ten weeks.

THE plaintiffs, the Angfaktieb Aktiebolag Karin, were the owners of the steamship *Lisa* ; the defendants were Strauss & Co. of London, the charterers of the vessel.

By a charterparty dated April 13, 1915, and made between the plaintiffs and the defendants, it was agreed that the *Lisa* should proceed to Pensacola and there load a cargo of rosin, and being so loaded should proceed to Kirkwall for orders to discharge at Narvik, Trondhjem, or Bergen. The charterers guaranteed that the cargo was for Russian consumption and that the names of the consignees should be inserted in the bills of lading; and Messrs. Adolf Lessing & Co. of Petrograd, a British firm, were named as consignees. The *Lisa* sailed from Pensacola on May 15 with 2070 tons of rosin, arrived at Kirkwall for orders on June 13, and was ordered by the charterers to discharge at Narvik. From Narvik the cargo would have had to be transported overland through Norway and Sweden to Petrograd. At that time Sweden was placing great difficulties in the way of transit licences to Russia, and quantities of goods for which transit licences were refused were being exported to Germany by the various Swedish merchants on whose hands the goods were left. It further appeared that in the course of her voyage to Kirkwall the *Lisa* had been stopped by a German submarine, and although she had on board a cargo of absolute contraband destined for one of Germany's enemies, she was allowed to proceed. Under these circumstances the British Government declined to allow the *Lisa* to proceed to Narvik unless the Swedish Government would grant a transit licence, but offered to give her clearances for Archangel. The shipowners were willing to let the *Lisa* go to Archangel provided the charterers would pay extra freight and demurrage. The consignees thought that transhipment licences would shortly be procurable, and on June 24 cabled to the charterers to keep

1920

THE LISA.

the *Lisa* at Kirkwall as long as possible. The parties, however, were unable to come to terms, and on September 15, 1915, the plaintiffs issued a writ in prize against Strauss & Co. and alternatively His Majesty's Procurator-General as the proper officer of the Crown.

The claim indorsed on the writ as against Strauss & Co. was for a declaration that by reason of the prolonged detention and arrest of the cargo and the failure of the defendants to procure its release, the plaintiffs were entitled to discharge the cargo as on a forced termination of the voyage due to the disability of the cargo, and on the terms of being paid a reasonable remuneration for the carriage of the goods in addition to the charterparty freight, and for delay and detention consequent on the disability of the cargo. Alternatively, the plaintiffs claimed damages for the detention of the ship and for failure to secure the due prosecution of the voyage by curing the disability attaching to the cargo. As against the Procurator-General the claim was for a declaration that the plaintiffs were entitled to be compensated for the detention of the ship and/or forced termination of the voyage. In the particulars of claim subsequently delivered the plaintiffs claimed 8949*l.* 2*s.* 7*d.* in respect of "the detention of the vessel at Kirkwall and subsequently at Leith, discharging a cargo of rosin in accordance with the orders of the British Authorities."

On September 18, 1915, on a summons taken out before the President (Sir Samuel Evans), the plaintiffs applied for an order that the cargo should be discharged as on a forced termination of the voyage, on the terms of the plaintiffs being paid a reasonable remuneration for the detention and for the carriage of the goods in addition to the charterparty freight. On this summons the President made no order. Meanwhile, on September 15, instructions had been received at Kirkwall that the cargo was to be discharged in the Prize Court, and accordingly the *Lisa* proceeded to Leith to discharge. On October 2 a writ in prize was issued by the Procurator-General claiming the condemnation of the cargo as contraband on the ground that it had an enemy destination and was

enemy property. From an affidavit filed by Mr. Stephen Gaselee, the Librarian of the Foreign Office, it appeared, however, that the proceedings in prize against the cargo were merely instituted "in order to put an end to the deadlock between the shipowners, the charterers and the consignees, and to enable the ship to get away." The cargo was ultimately sent on to Petrograd in another vessel, a permit having been arranged by the Russian Government Supply Committee for transit through Sweden, and on December 23, 1915, the Procurator-General's action against the cargo was discontinued. On July 16, 1920, the plaintiffs took out a summons for leave to discontinue their action as against the Procurator-General, and on July 26 the Procurator-General was dismissed from the action with costs.

Nov. 10, 11. *R. A. Wright K.C.* and *Balloch* for the plaintiffs. The goods not being provided with transit licences were "dangerous goods." The consignee, Lessing, must have known that the British Government would not let the goods go to Narvik, and the defendants were Lessing's agents, they were buying and shipping on his account.

[*Dumas.* The defendants do not dispute that they are answerable for Mr. Lessing.]

The defendants warranted that there was no existing obstacle to the goods being discharged at Narvik and have committed a breach of an implied term in the contract: see *Mitchell, Cotts & Co.* v. *Steel Brothers & Co.* (1) The defendants warranted that the voyage was possible, and it was a breach of warranty to load a cargo which was not safe for the voyage unless something happened which might or might not happen. The defendants undertook to name a safe port, and under the circumstances Narvik was not a safe port: cf. *Aktieselskabet Olivebank* v. *Dansk Svovlsyre Fabrik* (2), *Aktieselskabet Geysir* v. *Dansk Svovlsyre Fabrik* (3), and *Ogden* v. *Graham.* (4) When the British authorities declined to allow the cargo to be discharged at Narvik it was the

(1) [1916] 2 K. B. 610.
(2) [1919] 2 K. B. 162.
(3) (1919) 24 Com. Cas. 178.
(4) (1861) 31 L. J. (Q. B.) 26.

1920

THE LISA.

defendants' duty to use all reasonable diligence to procure the release of the vessel; the plaintiffs had a right to discharge the cargo at Kirkwall after waiting a reasonable time, and instead of assenting to this course the defendants procured the detention of the vessel for many weeks while they made ineffectual attempts to obtain the licences. The plaintiffs therefore are entitled to damages for detention.

Raeburn K.C. and *Dumas* for the defendants. The plaintiffs contracted to carry the cargo to Narvik and they failed to do so. They may be excused from performing the contract under the exception in the charterparty of "restraint of Princes," etc., but they cannot claim damages in lieu of freight. There is no absolute warranty that goods are safe and fit; the warranty only arises if the shippers knew or ought to have known of the dangerous character of the goods: see *Brass* v. *Maitland* (1); *Bamfield* v. *Goole and Sheffield Transport Co.* (2); *Acatos* v. *Burns.* (3) The case most in point is *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (4), and if the alleged warranty there laid down is applicable to the present case the presumption is that the plaintiffs, who are Swedish subjects, knew the Swedish law as to the prohibitions on transit and export; there is no presumption that the defendants had this knowledge and according to the evidence they had not. In fact, however, these were not "dangerous" goods, they were stopped by the British Government not because they were unprovided with transit licences but in exercise of belligerent rights on suspicion that if allowed to leave they might reach Germany, a suspicion probably engendered by the *Lisa* having been stopped by a German submarine and allowed to proceed.

As regards the frustration of the voyage, it is admitted that the plaintiffs would have been entitled, after waiting a reasonable time, to treat the contract as frustrated, but on the evidence they did not do so. Also they owed a duty to the defendants to do their best to overcome the delay: see Scrutton's Charterparties and Bills of Lading, 9th ed., s. 103;

(1) (1856) 26 L. J. (Q. B.) 49.
(2) [1910] 2 K. B. 94.
(3) (1878) 3 Ex. D. 282.
(4) [1916] 2 K. B. 610.

and by demanding unreasonable sums to go to Archangel delayed the negotiations. They cannot therefore make the defendants liable for that delay. It is said that the *Lisa* was "detained at the consignees' request." She was not detained from going to Narvik—a perfectly "safe port" and the port to which the defendants wanted her to go—but from going to Archangel, a port she could not have gone to under the charterparty. The request by the consignees to detain the vessel, on which it is said the British authorities acted, is therefore irrelevant.

Trehern held a watching brief for the Foreign Office and His Majesty's Procurator-General.

R. A. Wright K.C. replied.

Cur. adv. vult.

Nov. 16. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: On April 13, 1915, the Swedish steamship *Lisa*, described as then due at Madeira, was chartered by her owners, the Aktiebolaget Karin, to Messrs. Strauss & Co. of London to proceed to Savannah or Pensacola, as might be ordered by the charterers before leaving Madeira, to load a cargo of rosin in barrels, and, being so loaded, to proceed to Kirkwall for orders to discharge at Narvik, Trondhjem or Bergen, one port only, or so near thereto as she might safely get, and there to deliver the cargo in accordance with bills of lading for freight payable in advance. Lay days and running days were agreed by the charterparty, and, in case of failure to discharge in the specified time, the charterers agreed to pay demurrage at the rate of 4*d.* per net register ton per day. Arrests and restraints of Princes, Rulers and people were excepted from the ship's liabilities. The charterers agreed that the cargo was for Russian consignees, and that the name of the consignees should be inserted in the bills of lading.

On May 14, 1915, the lading of the *Lisa* was completed, and bills of lading were issued in accordance with the charterparty, which disclosed as consignees Messrs. Adolf Lessing & Co. of Petrograd. They were a British firm, for whom

1920

THE LISA.

The President.

Messrs. Strauss & Co. were agents. On May 15, 1915, the *Lisa* sailed. The cargo of rosin was intended by the consignees to be discharged at Narvik, and from thence to be carried overland through Sweden and Finland to Petrograd.

In April and May, 1915, there were in force in Sweden regulations which forbade the export of rosin from that country except under licence of the Swedish Government. On May 20 further regulations came into operation in Sweden, whereby a licence was also required for the transit of rosin within that Kingdom. What knowledge the parties or either of them had of export regulations before the making of the charterparty was not shown by the evidence; but the plaintiffs were Swedish shipowners, and, in the absence of proof to the contrary, I assume them to have had such knowledge. The consignees had knowledge at the time of the arrival of the *Lisa* at Kirkwall; how long they had had such knowledge was not shown.

On June 13, 1915, the *Lisa* arrived at Kirkwall. She was ready to proceed forthwith to Narvik, and the consignees, through the defendants, gave her orders next day so to proceed. She was, however, detained at Kirkwall until September 15, 1915, by continuous refusal of clearance at the Customs, which took place upon instructions given through the Admiral commanding locally, at the instance of His Majesty's Government. On September 15 the vessel was placed in the custody of the Marshal, and on October 2 a writ was issued by His Majesty's Procurator-General claiming condemnation of the cargo as contraband with an enemy destination. The loss caused to the owners of the *Lisa* by her detention at Kirkwall between June 13 and September 15, 1915, is the subject matter of their claim in the present proceedings. The salient fact in this part of the case is the detention of a neutral ship for four months without proceedings in prize. As to the proceedings ultimately taken, it is only necessary to add that the cargo was released by consent of the Procurator-General later in 1915.

The plaintiffs issued a writ in prize on September 15, 1915, against the defendants, Strauss & Co., and His Majesty's

Procurator-General, claiming against them alternatively damages in respect of the detention of the ship, and against Strauss & Co. a declaration that (inter alia) the plaintiffs were entitled to discharge the cargo as on a forced termination of the voyage due to disability of the cargo, with additional remuneration for the carriage of the goods, and damages for the detention. Later the action against the Procurator-General was discontinued.

An affidavit of Arvid Anderson, sworn and filed on behalf of the plaintiffs in September, 1917, states that the time directly lost owing to detention was ninety-seven days, allowing for the time which would have been required for discharge after the arrival at Narvik, and that further loss of time to the amount of eight days was caused by necessary cleaning and painting due to the prolonged detention of the ship in the roads at Kirkwall. In this affidavit the deponent alleges that: "the *Lisa* with her cargo was detained at Kirkwall at the express desire of the consignees of the cargo." He says also that the consignors "were informed by His Majesty's Government that the *Lisa* was at liberty to proceed to Archangel whenever the consignors wished, or that they might discharge the cargo in the United Kingdom, or, thirdly, that if they could satisfy His Majesty's Customs that they had obtained a licence for transit of the cargo to" (meaning I think "through") "Sweden there was no objection to the vessel proceeding to Narvik to discharge it there."

It was not in dispute between the parties at the hearing that the *Lisa* was persistently refused clearance by the Customs at Kirkwall during her whole stay there, and I was satisfied by the evidence adduced that the naval officer in command, acting under his orders, would not have allowed her to proceed to Narvik until satisfactory evidence was forthcoming that her cargo would be forwarded overland through Sweden to Russia. Without provision for such transit the rosin was not unlikely to find its way to Germany and to be used for belligerent purposes of the enemy.

The plaintiffs' case was put upon four grounds: (1.) that the goods, unprovided with a transit licence, were "dangerous

1920

THE LISA.

The President.

goods" in that the absence of such a licence would inevitably result in the stoppage of the cargo, and the ship laden therewith, at Kirkwall by the British authorities; (2.) that the charterers were under an implied obligation to give orders to the ship at Kirkwall for a safe port, and that Narvik was not such a port; (3.) that the charterers and the consignees owed a duty to the shipowners to use all diligence at Kirkwall to procure the release of the *Lisa* and had failed to do so; and (4.) that the charterers and consignees had procured the detention of the ship so as to be liable therefor in damages.

The plaintiffs' cause of action on the first of their alleged grounds of complaint was founded upon a proposition that the contract of affreightment and the shipment involved a warranty or implied agreement by the consignors against the existence of risks in connection with the cargo other than the ordinary risks of a voyage from Pensacola to Narvik, or at any rate against the existence of any exceptional risks known to the shipper and unknown to the shipowner. Reliance was put upon the judgment of Atkin J. in *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) In the case so relied upon goods were shipped to a port where by reason of regulations which were known to the shipper but unknown to the shipowner they could not lawfully be discharged. The law on the subject was thus stated by the learned judge: "A shipment of goods upon an illegal voyage—i.e., upon a voyage that cannot be performed without the violation of the law of the land of the place to which the goods are to be carried—a shipment of goods which might involve the ship in danger of forfeiture or delay—is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship." The learned judge also said that the shipper at least "undertakes that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the owner facts which are within his knowledge indicating that there is such risk, if the owner does not and could not reasonably know those facts." The rule of law enunciated in *Mitchell, Cotts & Co.* v. *Steel*

1920

THE LISA.

The President.

Bros. & Co. (1) was not questioned before me on behalf of the defendants, but they disputed its relevance to the facts of this case. In particular the possession by the shippers of any knowledge of risks material to this inquiry which were unknown to the plaintiffs was wholly denied, and, as I think, was denied truly in point of fact. It was urged also that the risk of the stoppage at Kirkwall which in fact occurred was not a risk incident to the cargo which brought the cargo within any of the known categories of dangerous goods in respect whereof a shipper is held to be impliedly a warrantor to a shipowner. The risk which in truth existed at Kirkwall was not that of stoppage by reason of any municipal law or regulation there in force. Nor was it a risk of stoppage at Narvik by reason of any municipal law or regulation there in force. It was in truth the risk that the British Government in the exercise of belligerent rights would arrest or detain the ship under the law of prize. This was not a concealed danger in the nature of the goods, or a concealed danger in the nature or probable incidents of the voyage. Each party was as well aware of it as the other. In my opinion, therefore, the first of the plaintiffs' grounds of claim is not well founded.

As to the second ground of claim, the plaintiffs again relied upon a principle which was not in dispute—namely, that where a charterer has the choice of ports, some accessible or "safe" and some inaccessible or "unsafe," he must nominate an accessible or "safe" port. Counsel for the defendants, however, insisted that as between the three ports named in the charterparty, Narvik, Bergen, and Trondhjem, all were equally accessible and "safe." I am satisfied, upon the evidence before me, that Narvik, Bergen, and Trondhjem were open to precisely the same objections on the part of the British authorities as ports for the discharge of a cargo of rosin. The second ground of claim therefore fails.

The third and fourth contentions of the plaintiffs involve considerations of fact and of law which are to some extent common to both. The British Government was not ready to permit a cargo of rosin to be cleared from Kirkwall for a

(1) [1916] 2 K. B. 610, 614.

1920

THE LISA.

The President.

voyage to a Norwegian port en route to Sweden unless and until it had satisfactory assurances that the goods would not pass out of Sweden into the control of Germany. Further, the British Government in the exercise of its belligerent rights was ready to interrupt such a voyage by proceedings in prize—or by any other form of action recognized by the law of nations, as, for example, by requisition and purchase. Some grounds for proceeding in prize with regard to the cargo of the *Lisa*, but not with regard to the ship, existed or were supposed to exist, as was made apparent in September when proceedings in prize were taken. The rosin, however, was destined by the consignees for Russian use, and it would have been contrary to the common interests of His Majesty and the Allied Powers to have needlessly withdrawn this cargo from Russian consumption. The last mentioned consideration seems to me to be important. I see no reason, moreover, to suppose that any detention of the *Lisa* would have been knowingly authorized by His Majesty's Government except in so far as appeared justifiable under international law, or by consent of parties concerned.

The *Lisa* was detained on June 13, 1915, in pursuance of a settled course of action such as I have indicated on the part of His Majesty's Government and its agents, in relation to cargoes of rosin such as that of the *Lisa*. What followed is relied upon on both sides. Mr. Lessing was at Petrograd and was asked by the British Embassy for information as to the cargo. He was informed it was detained and the officials of the Embassy discussed with him his wishes. He desired that the cargo should go on to Narvik. Archangel was mentioned as an alternative. An understanding was arrived at that, pending an effort to get a transit licence, the ship should stay at Narvik. As a result Lessing's Petrograd agent, Hans Smith, telegraphed to his London agents, the defendants, to keep the *Lisa* at Kirkwall as long as possible, and that he believed a transit licence would be forthcoming in a few days. The officials of the Embassy at Petrograd believed, and the fact was, that the consignees desired that the *Lisa* should not be diverted from her Kirkwall and Narvik voyage, and in this

belief, pending attempts of the consignees and of the shipowners acting with them to procure a licence or to arrange an alternative route, the *Lisa* was not granted a clearance from Kirkwall. It is said truly on behalf of the defendants that the consignors and consignees did not procure the stoppage of the *Lisa* and that she would not in any case have been allowed to proceed to Narvik with her cargo except upon compliance with conditions which they could not satisfy. It is also said—and I will assume for this purpose is truly said—that they had not come under any obligation to the plaintiffs to obtain a transit licence in Sweden. But this does not dispose of the case. The cargo owners were bound in my opinion to abstain from doing anything which would lengthen the voyage of the *Lisa*. Did they so abstain? When they became aware of the ship's detention and its cause they were not passive. They encouraged, and as I think procured, the continuance of the ship's stay at Kirkwall and the postponement of any decisive action on the part of the Crown.

I will refer shortly to the facts which lead me to the conclusion I have stated, in addition to those which relate to the powers and intentions of the agents of His Majesty's Government. Mr. Lessing's evidence and conduct show that he was fully informed in Petrograd of the alternatives which were open with regard to the cargo, and, as is shown by his telegram of June 24, 1915, he decided to keep the *Lisa* at Kirkwall as long as possible in order that he might exhaust every means of securing a Swedish transit licence. The obtaining of such a licence was his affair and not that of the shipowners. The consignees' agent, Mr. Hans Smith, had informed the shipowners on June 21 that the *Lisa* would be detained, as in fact she afterwards was. There is no indication in all the acts of the consignees and their agents in July and August that they took practical or serious steps in any other direction than that of keeping the *Lisa* at Kirkwall until they could overcome the deadlock in Sweden. When the Swedish Consul at Kirkwall telegraphed to the defendants on August 7 "Delay is due to owners of cargo not coming to a decision" the defendants replied "It is British

BIBL. LONDIN URIV.

1920

THE LISA.

The President.

Government preventing *Lisa* going to Narvik," and this was in a sense true. But the course taken in Petrograd by the consignees had brought about the prolonged interruption of the voyage.

In view of the objections raised by the defendants to the admissibility in evidence of the affidavit of Mr. Stephen Gaselee I have examined the case in the first instance on the footing that this statement is inadmissible, and have arrived at the conclusion I have already stated in that way, treating the declaration in the affidavit as though it were no more than a suggestion made without proof in the course of the case. I am of opinion, however, that the affidavit is receivable. This Court is not bound by the rules of the common law as to evidence. A judge in prize may, I believe, be informed of the facts relevant to a question under trial before him by all available means of trustworthy information. The meaning and cause of the detention of the *Lisa* by officers of the Crown in time of war are in question here. It seems to me that prima facie there could be no better source of knowledge upon this matter than a declaration made on behalf of the Crown by a responsible person in its service who is the proper custodian of the sources of official information. Subject to all proper reservations as to rights of cross-examination and as to the weight which ought to be given to official statements, I think myself entitled, and indeed bound, to examine this affidavit. When examined it powerfully corroborates the view of the facts which I have taken. Mr. Gaselee states in express terms that " Sir George Buchanan telegraphed on June 24 that Messrs. A. Lessing requested that their consignment of rosin on the steamship *Lisa* should be detained by the British authorities until transit through Sweden was re-established; even if this involved waiting several weeks." The statement tallies exactly with the telegram which Messrs. Lessing themselves sent. It shows why the plaintiffs' ship as well as Messrs. Lessing's cargo on board her was kept at Kirkwall without any proceedings in this Court during the great part of the time from June 17 to September 15, 1915. As to the admissibility of Mr. Gaselee's

affidavit I would add that if these proceedings had taken the form of an action in the ordinary jurisdiction of the High Court as a commercial case it would have been necessary to consider whether the statements of both the alleged parties to the detention of the *Lisa*—the Crown by its agents, and the cargo owners—were not receivable against each.

The defendants relied in some measure on the acquiescence of the plaintiffs in the ship's detention, and it is true that the plaintiffs acted on the assumption that the arrest was a misfortune of war time which they must do their best to overcome. I think their conduct in this respect did not waive any rights they had, and I observe that as early as June 19, and on numerous later dates, they insisted that they were entitled to be paid by the consignees for demurrage. The whole delay of the *Lisa's* voyage was not attributable to the consignees, and the delay so attributable is not capable of exact computation. I estimate the delay which was due to their action to have been delay of ten weeks. In case the parties cannot agree an amount for damages there must be an assessment by the Registrar and Merchants.

In view of the fact that this is a decision in prize, upon the one question raised before me which was properly "justiciable" in prize, I think it is proper I should point out that I have dealt with the other questions which were discussed at the hearing because the parties had expressly agreed to submit them to the Court sitting in prize, and not in the intended exercise of any other jurisdiction of this Division of the Court. I disapprove generally of the combination of claims under municipal law with the claims in prize which are properly dealt with here, and which arise under international law and are governed by a special code of procedure.

Solicitors for the plaintiffs : *Botterell & Roche.*

Solicitors for the defendants : *Thomas Cooper & Co.*

Solicitor for the Foreign Office and the Procurator-General : *The Treasury Solicitor.*

E. C. M. T.

C. A.
1920
Nov. 24.

[IN THE COURT OF APPEAL.]

THE KRONPRINZ OLAV.

Admiralty—Collision—Limitation of Liability—Distribution of Proceeds—Plaintiff's Right to claim against Fund—Unascertained Claims—Discretion—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

In February, 1917, two Norwegian vessels, the *C.* and the *K. O.*, came into collision and the *C.* sank. In March, 1917, the owners of the cargo laden on board the *C.* began an action against the owners of the *K. O.* in the Admiralty Court. The action was heard in May, 1919, when both vessels were pronounced to blame, and accordingly it was adjudged that the plaintiffs were entitled to receive a moiety of the amount of their damage from the defendants. Thereupon the defendants, the owners of the *K. O.*, commenced a limitation action against the owners of the *C.*, the owners of her cargo, and all persons claiming to have received damage by reason of the collision. This action was heard in February, 1920, when a decree was pronounced limiting the liability of the owners of the *K. O.* to 8*l.* per ton on the registered tonnage of the *K. O.* calculated in accordance with the provisions of the Merchant Shipping Act, 1894. The decree provided that all claims were to be brought in within three months and that claims not so brought in would be excluded from sharing in the limitation fund. Claims were filed by the owners of the cargo on the *C.*, but although the owners of the *C.* entered an appearance they took no further steps in the limitation proceedings. Meanwhile, however, in February, 1919, the owners of the *C.* had commenced an action in Norway against the owners of the *K. O.*, and in June, 1920, when the reference was held in the limitation proceedings and the Registrar made his report, the trial of the Norwegian action was still pending. The owners of the *K. O.* accordingly took out a summons asking that the report be not confirmed and that they might have leave to file a claim against the fund in respect of any liability they might incur under the Norwegian proceedings. Hill J. declined to postpone the distribution of the fund and dismissed the summons. The plaintiffs (the owners of the *K.O.*) appealed:—

Held (Younger L.J. concurring for different reasons), (*a*) that the plaintiffs had no absolute right under the limitation sections of the Merchant Shipping Act to have the distribution of the fund stayed and to bring forward a claim when ascertained; (*b*) that limitation proceedings do not contemplate claims by plaintiffs, and that the owners of the *K. O.* could not file a claim against the fund in their own right; (*c*) (Atkin L.J. dubitante) that had an application been made in proper form the Court would have had a discretion to extend the time before distributing the fund, in order to allow the plaintiffs to ascertain their liability under the pending Norwegian judgment and to apply to the Court to adjust the distribution of the fund so that the plaintiffs might obtain credit for the amount payable under the Norwegian judgment; (*d*) but that, having regard to the lapse of time, and

to the fact that limitation proceedings contemplate that claims shall be brought in promptly and the distribution of the fund not be unreasonably delayed, the Court had rightly exercised its discretion in refusing to postpone the distribution of the fund.

C. A. 1920

THE KRONPRINZ OLAV.

APPEAL from a decision of Hill J. dismissing the plaintiffs' application for an order that the Registrar's report in an action of limitation of liability be not confirmed, and that the plaintiffs should be at liberty to file a claim.

The following statement of the facts is in substance as stated by the learned judge in giving the reasons for his decision on July 29, 1920. On February 2, 1917, a collision happened between the Norwegian steamships *Kronprinz Olav* and *Cuba*. The *Cuba* sank with her cargo. On March 3, 1917, the owners of the cargo laden on board the *Cuba* began an action in rem in this Court against the owners of the *Kronprinz Olav*. On May 13, 1919, a decree of both to blame was pronounced in that action, and the owners of the *Kronprinz Olav* were accordingly condemned in a moiety of the cargo owners' damages. The owners of the *Kronprinz Olav* thereupon brought a suit of limitation of liability in accordance with the provisions of ss. 503 and 504 of the Merchant Shipping Act, 1894 (1), against the owners

(1) Sect. 503: "The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say . . . . (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts; that is to say . . . . (ii) in respect of loss of, or damage to, vessels, goods, merchandise . . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage."

Sect. 504: "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court . . . . and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

C. A. 1920

THE KRONPRINZ OLAV.

of the *Cuba*, the owners of her cargo, and all persons claiming to have suffered damage by reason of the collision. On February 2, 1920, a limitation decree was pronounced by this Court, and that decree contained the usual provisions as to bringing in claims within a certain time (three months) and as to excluding claims not brought in. Claims were filed by the owners of the cargo on board the *Cuba* and by the master and crew of the *Cuba* in respect of their lost effects. A reference was held in pursuance of the limitation decree, and on June 29, 1920, the Registrar made his report. He found the amount due to the claimants who had filed claims to be in the aggregate 23,725*l.* 12*s.* 6*d.* The amount of the limited liability of the owners of the *Kronprinz Olav* was 9385*l.* 16*s.* 9*d.* That amount has been duly paid into Court under the limitation decree. The owners of the *Cuba* did not file any claim in the proceedings under the limitation decree. They entered an appearance, but they did nothing further.

His Lordship continued as follows: "I was told that the owners of the *Cuba* are suing the owners of the *Kronprinz Olav* in Norway, and that a decision is expected some time in the autumn. [That action was commenced on February 17, 1919, and judgment was given on September 30, 1920, condemning the owners of the *Kronprinz Olav* in two-thirds of the damages of the owners of the *Cuba*.] In these circumstances the owners of the *Kronprinz Olav* apply by the present summons for an order that the report be not confirmed, and that they, the owners of the *Kronprinz Olav*, be at liberty to file a claim. What they aim at is this. They fear that as the result of the proceedings in Norway they may become liable in damages to the owners of the *Cuba*, and if they have to pay the owners of the *Cuba* in Norway they desire to stand in their shoes and prove against the limitation fund in respect of any moneys so paid. The claimants in whose favour the Registrar has reported object and assert that they are the only claimants before the Court, that the time limited for bringing in claims has expired, that the owners of the *Cuba* have brought in no claim, and that the owners of the *Kronprinz Olav* are not in a position to bring in any claim."

"I think the objections of these claimants are sound. No doubt if the owners of the *Kronprinz Olav* had discharged a liability arising out of the collision to the owners of the *Cuba*, they would in the limitation proceedings be entitled to stand in the shoes of the owners of the *Cuba* and prove against the fund as being subrogated to the rights of the owners of the *Cuba*: see *The Crathie*. (1) But they have not paid anything and are not yet found liable to pay anything. They have no claim against the fund. They have filed no claim within the time limited, and are to-day not in a position to file any claim or to say with any certainty that they will ever have a claim which could be filed at any time. In these circumstances it would in my judgment be wrong to postpone the right, which the claimants who have proved have already acquired, to have the fund distributed in satisfaction of their claims. I dismiss the summons with costs."

The plaintiffs appealed.

C. R. Dunlop K.C. and *John Bridge Aspinall* for the appellants. Sects. 503 and 504 of the Merchant Shipping Act, 1894, give to plaintiffs in a limitation suit an absolute right to have their liability limited to 8*l.* or, where there is loss of life, to 15*l.* per ton. The effect of the statute in the present case is that the plaintiffs are not liable in respect of damages arising out of the collision beyond 9385*l.* By refusing to allow the plaintiffs to prove in the limitation action the result will be that they will be liable to the claimants in this country to the amount of 9385*l.*, and to the owners of the *Cuba* in Norway to an amount estimated at upwards of 16,000*l.* It is immaterial that the owners of the *Cuba* have not brought in a claim in the limitation action; the plaintiffs are entitled to credit in respect of sums which they have to pay to foreign claimants who have not come in to the limitation action: see *The Crathie* (1) and *Rankine* v. *Raschen*. (2) In the present case, as the amount due to the

(1) [1897] P. 178. (2) (1877) 4 R. 725.

C. A. 1920

THE KRONPRINZ OLAV.

owners of the *Cuba* is not yet ascertained, the learned judge should have postponed the distribution of the fund and allowed the plaintiffs to file a claim. The Court is not debarred from giving effect to the statute merely because the time fixed for filing claims has expired: *The Zoe.* (1) If the plaintiffs are not entitled as of right, they ask the Court to exercise its discretion in their favour by setting aside a portion of the fund; in the event of that portion not being required to satisfy the claim in the Norwegian action the claimants here will get it in due course, and the plaintiffs will consent to pay interest upon it.

Langton for the respondents, the claimants against the fund. There is no case in which the Court has allowed a claim in respect of a contingent liability for which the materials for its assessment were not before the Court. In the cases cited by the appellants the amounts alleged to be due to persons who had not come into the limitation proceedings had in fact been paid. The plaintiffs took no steps to put themselves right, although they knew all about the Norwegian proceedings, and they are out of time. Having regard to the lapse of time, the learned judge rightly exercised his discretion in refusing to allow the distribution of the fund to be postponed for an indefinite period.

Dunlop K.C. replied.

BANKES L.J. This is an appeal from a decision of Hill J., and as put by Mr. Dunlop raises an important question. Mr. Dunlop's claim in substance was that under the circumstances of this case the plaintiffs had a right to an order from the Court staying the distribution of the fund paid into Court in the limitation proceedings until they had had the opportunity of bringing before the Court a claim on their own behalf founded upon the amount which they had been held in a Norwegian Court liable to pay to the owners of the *Cuba*. [His Lordship stated the facts and continued:] Upon those facts the main contention is that the plaintiffs have a right to have the distribution of the fund stayed and a right to

(1) (1886) 11 P. D. 72.

bring forward their claim, whenever it is ascertained, to rank as a claim which must be allowed. The foundation of Mr. Dunlop's argument is that under s. 503 of the Merchant Shipping Act, 1894, the plaintiffs have a statutory right to have the amount of the damages, which are payable by them under the decision of the Admiralty Court, limited. There are two observations which it seems to me it is necessary to make in reference to that contention. First, the statute can only affect claims of persons who are affected by the statute, it can have no effect upon a claim by a foreigner in a foreign country, and, therefore, it is not true to say that the statute gives the owner of a vessel any absolute right to limit the amount of his liability; the right is qualified by the fact that it has reference only to the claims of persons who are affected by the statute. Secondly, it appears to me on reading s. 504 that the claimants there referred to are clearly persons other than the person who is seeking to limit his liability, and that when the application was made to the Court below and to this Court that the plaintiffs, the owners of the *Kronprinz Olav*, might bring in a claim, their application was wrong in form; the proper form would be an application that they might have the benefit of the statute by being allowed credit, as against the fund, for any amount that they may have to pay in respect of the Norwegian judgment. That is more a matter of form than a matter of substance, but as a matter of form I think that the plaintiffs are wrong in suggesting that they have any claim in their own right which they can bring forward as against the fund.

The decree which was made followed the language of the section, and it not only limited the liability to a certain amount, but it ordered that advertisements should be issued intimating to "all persons having any claim in respect of loss or damage caused as aforesaid that if they do not come in and enter their claims on or before the 3rd day of May, 1920, they will be excluded from sharing in the aforesaid amount." The Court clearly was competent to make such an order, and if a claimant did not come in and make a claim by that date he was in mercy, and it would be in the discretion of the Court as to whether he

C. A. 1920

THE KRONPRINZ OLAV.

Bankes L.J.

should be allowed to make his claim in spite of the fact that the time had expired. There is no soft of doubt that the Court has jurisdiction to extend the time, and in my opinion it ought always, in a proper case, to extend the time if it is shown that for some good reason the claimant was either not in a position, or was unable, to make the claim within the time specified. I think the fact that the Court has jurisdiction to extend the time is quite plainly established by decided cases : see, for example, *The Zoe*. (1) I am of opinion, therefore, that assuming the plaintiffs had made their application to the learned judge in the proper form and had asked him for an extension of time, it would have been within his jurisdiction to grant the application, not because the plaintiffs had an absolute right to an order as a matter of course, but because the Court would, in my opinion, have had jurisdiction to allow the plaintiffs to put forward a claim in proper form, although the owners of the *Cuba* had not themselves put forward any claim in time or at all, and although possibly some considerable time may have elapsed since the date fixed for bringing in claims.

Some question may arise as to whether there is any difference between the case in which the shipowner who has successfully established his right to limit his liability is called upon to meet a claim by a claimant resident in this country and a case in which the claimant is resident abroad and has either established, or is seeking to establish, his right abroad. I do not think it is necessary to decide that question on this particular appeal, but, speaking for myself, I think that it is difficult to see why any distinction should be drawn between the two cases if the object of the Court is to give to the applicant the relief which, as between himself and the claimants to the fund, the statute seems to me to contemplate that he should have. I do not think it is necessary to decide that point definitely on this particular appeal, because Mr. Langton has satisfied me that having regard to the dates, the order of the learned judge was in substance right.

This collision took place as long ago as February, 1917.

(1) 11 P. D. 72.

The plaintiffs have known of these proceedings in Norway ever since February, 1919. The decree in the limitation action was not till February, 1920, and the plaintiffs were apparently content, as is stated in their affidavit, to take their chance of the proceedings in Norway turning out in their favour. They did not at the time the decree of limitation was made, or at any subsequent stage until after the report of the Registrar, attempt to bring forward or indicate that there was this contingent liability in respect of claims which the owners of the *Cuba* might establish in Norway. The plaintiffs allowed time to run on and did nothing until this very late stage in July, 1920, when the application was made to the judge to further hang up these proceedings. I am satisfied that although it was the intention and the object of the statute to protect an owner by allowing him to limit his liability in the manner indicated by the statute, it was also the intention that within some definite time, to be fixed by the Court at the time of the decree, those persons who would be entitled to any distribution of the fund in Court should have the amounts paid out. It seems to me that quite sufficient time has elapsed, and that it does not lie in the mouths of these plaintiffs, who have done nothing for so long and have been content to trust to the Norwegian decision being in their favour, to come at this late stage and to endeavour to hang up these proceedings for a further indefinite time ; for even now the amount of the damages is not ascertained and there is no indication as to when it is likely to be ascertained.

For these reasons I come to the conclusion that the learned judge's order was in substance right, and that it has been shown that the distribution of this fund ought not any longer to be delayed. It is a matter entirely in the discretion of the Court whether the distribution shall be further postponed, and in my opinion the right view to take is that the time has come when the fund should be distributed. Under these circumstances it does not seem to me necessary to discuss either of the two decisions to which we have been referred, *The Crathie* (1) and *Rankine* v. *Raschen* (2), because the facts in

(1) [1897] P. 178. (2) 4 R. 725.

C. A. 1920

THE KRONPRINZ OLAV.

Bankes L.J.

those cases were so different. In both cases a sum of money had in fact been paid to claimants, and they were, I think, bound by the provisions of the statute. I do not think it is possible to extract from either of those decisions any real assistance in reference to the proposition which has been propounded by Mr. Dunlop.

In my opinion the appeal fails and must be dismissed with costs.

ATKIN L.J. This application arises out of a collision which took place in 1917 between two Norwegian-owned vessels, the *Kronprinz Olav* and the *Cuba*, in which the *Kronprinz Olav* sank the *Cuba*. Neither of those parties, being Norwegians, are subject to the operation of English statutes, but by s. 504 of the Merchant Shipping Act of 1894, it is provided that "where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods . . . . the owner may apply" for a limitation of proceedings. What the exact restriction is upon the rights of the owner of a foreign ship in that respect, if any, it is unnecessary to say, but certainly those are very large rights given to foreign owners. The owners of the *Kronprinz Olav* commenced proceedings in the Admiralty Court with a view of having their liability limited. They did not do so until the owners of the cargo on the *Cuba* had commenced the ordinary Admiralty proceedings against the owners of the *Kronprinz Olav*, and an award had been made in favour of the plaintiffs in that action. Thereupon the owners of the *Kronprinz Olav* commenced their proceedings for limitation of liability against the owners of the *Cuba*, the owners of the cargo, and all other persons who were said to have sustained damage. Those proceedings were commenced in 1919, and on February 2, 1920, a decree was made in the ordinary form. [His Lordship read the decree and continued:] The Registrar and merchants proceeded to deal with the claims that were brought in, and duly made their report on June 29 last. Upon that report, if the parties accepted it,

in accordance with ordinary practice I think the amounts would be paid out; there would be no express motion to confirm the report; but an application might be made to confirm it or an application might be made complaining of it, and in this particular case on July 7 the plaintiffs in the action took out this summons "that the Registrar's report be not confirmed and the plaintiffs be at liberty to file a claim." It appears to me that this was an unfounded application.

What the plaintiffs had in their minds was, that ever since the beginning of 1919 the owners of the *Cuba* had been taking proceedings in personam against them in the Norwegian Courts for damages in respect of the loss of the *Cuba*, and the owners of the *Cuba* had not brought in any claim before the Registrar and merchants. They preferred to rely upon their own Courts in respect of that liability which they were entitled to enforce in Norway, as they clearly were not subject in their own Courts to the restrictions imposed upon them by the English statutes, and those proceedings were still pending at the time that this summons was taken out. What the plaintiffs desired was that they should have the benefit of any claim made in the Norwegian action which they might have to settle, so that the distribution of the proceeds in the Admiralty Court might be made upon the footing that the owners of the *Cuba* had made a claim which in fact they had not made, and that the plaintiffs should have credit, in the proceedings here against the total sum paid into Court, in respect of the claim made by the owners of the *Cuba*.

To my mind, to begin with, it is entirely wrong to say that proceedings in limitation actions contemplate any claim by plaintiffs. The contention seems to me to be a contradiction in terms; the claims are claims against the plaintiffs, claims to enforce liability against the plaintiffs; the claims can only be paid out of the fund; and, therefore, for the plaintiffs to apply to be allowed to file a claim, is an application for something to which it seems to me they were not in the least entitled. Nevertheless, it may be that they were entitled to make an application on the ground that the fund in Court ought not to be distributed except upon the footing

C. A. 1920

THE KRONPRINZ OLAV.

Atkin L.J.

that certain claims not in this country had been made; and the question is whether that application ought to be acceded to, made in that form in this particular case. It is plain I think that the distribution of the fund in Court is not dependent upon the claims that are brought in and assessed before the Registrar and merchants, because it may be that a claim has already been settled by the plaintiff, and, if so, it is his duty to bring that fact before the Court in order that the sum which has already been paid should be taken into account in relief of his liability to which, on the hypothesis that his liability is limited to 8*l.* per ton on the registered tonnage of his vessel, he is entitled. I say the distribution is not on the claims as brought in before the Registrar, because when the Court is informed that the plaintiff has paid such a claim as that, unless all parties accept it the Registrar and merchants have to ascertain what was the true amount of that claim if it had been brought in; otherwise a serious injustice might be done to the other parties by the claim being taken into account on a larger footing than in fact it deserved, and therefore it may involve an investigation by the Registrar and merchants.

I know of no case where the Registrar and merchants, or the Court, in dealing with something which is not the subject matter of a claim brought in before the Registrar and merchants, have dealt with it except upon the footing that payment has actually been made by the plaintiffs. The suggestion here is that the Court has a further power to consider not only a claim in fact made within the jurisdiction and settled but a contingent claim that is being made or may be made abroad, in respect of a party who is not subject to the restrictions of the particular section of the Merchant Shipping Act. I have been in very considerable doubt whether such a claim can be considered at all, because it seems to me that the benefit that is given under this statute is given to persons who come within the jurisdiction of the statute; it is a restriction upon the rights of persons who, on this hypothesis, have got a claim larger than in fact they are going to be paid, and that restriction does not apply at

all in the case of foreigners who are in a position to make their claim outside the jurisdiction. I see nothing to compel them, at any rate, to come here and make their claims, and if there is nothing to compel them to make their claims here I find it very difficult to conceive that the Court can order the fund to be adjusted upon the footing that such a claim was made. I do not propose to determine that matter, however, as I do not think it is necessary.

One of the features, and a necessary feature, of the procedure under the Act is that there is a period of time to be fixed by the Court within which claims must be brought; otherwise they are excluded. I agree that in special circumstances there may be grounds for extending that time—it is not an absolute restriction and the Court may extend it—but the object is plain enough. The object is to enable the amounts that are to be paid out of the fund in Court to be ascertained, because the portion which each claimant will be entitled to receive out of the fund in Court depends upon the precise assessment to a shilling of all the other claims which have to be brought into account, and it is obvious that if claims are left outstanding there will be a delay in ascertaining how much each person can receive. To my mind it would be a very hard position if, in spite of the decree made in accordance with the Act fixing a period of time after which claims are excluded, the Registrar and merchants, for the purpose of assisting the Court to determine how much money is to be paid out, are to take into account contingent claims which in fact have not been made at all but which may yet be made because of a right in the future. In this case a claim was made in Norway within two years of the collision, but supposing the limitation suit had been commenced, as might very well have happened, within a month or two months of the collision. The suggestion that the Court must wait until a person who has a foreign claim has first of all delayed until the extreme period of limitation, whatever it may be—it may be two years under the Maritime Conventions Act—before he makes his claim at all, and then that the Court must wait until that claim has been assessed in the

C. A. 1920

THE KRONPRINZ OLAV.

Atkin L.J.

foreign Court, has been further revised by the Registrar and merchants in order to see that it is fair and that it does justice to the other claimants, makes it fairly obvious what the inconvenience and real injustice to the other claimants of such a procedure would be. To my mind the circumstances in this case would do the same injustice, though not to the exaggerated extent that I have suggested as possible. The claim was in 1917; no proceedings were taken promptly; the cargo-owners did not get their decree until 1919; then the limitation of liability proceedings were commenced. During the whole of that time the present plaintiffs were aware of this claim, for proceedings were commenced in Norway in February, 1919. During the whole of that time they refrained from referring to the claim in their statement of claim; they did not get the decree moulded with reference to that claim; and they made no application that it should come before the Registrar and merchants. They waited until after the report of the Registrar and merchants; and indeed they waited, as appears from their affidavit, because they were of opinion that the claim in the Norwegian Court was not likely to be successful. After the whole of that delay they then proceed to make an application which in my view, as I have said, is quite unfounded, that they should be at liberty to file a claim themselves. I am not quite sure that one is doing the application full justice in saying that before the learned judge they limited their claim in that way; I think it is possible they may have applied to the learned judge to exercise his discretion in their favour, by ordering that a payment out should be made to them on the footing that the claim had been made by the owners of the *Cuba*. If they did not, then they are in the further dilemma that they have failed to ask any Court to exercise a discretion in their favour until they come to this Court, a still further delay. To my mind it clearly was the intention of the Legislature that these claims should be brought in reasonably promptly so as to enable a distribution to be made of the sum which the claimants are at any rate entitled to have, and I think it would be a very bad precedent to allow plaintiffs to delay,

and delay for a very considerable period as in this case, and then at the last moment to come in and hold up a distribution of the fund by a delay of many months. If this application were granted, the decree in the Norwegian Court even now does not fix the true amount of the claim of the owners of the *Cuba*; and even when that has been ascertained in Norway it does not bind the other claimants, who might still desire to have it referred to the Registrar and merchants to determine the true amount of the collision damage done in 1917.

Under these circumstances it appears to me that it would be quite wrong for us to exercise our discretion, if we have it, to allow this application, and I agree that the appeal ought to be dismissed.

YOUNGER L.J. One cannot, I think, read s. 503 of the Merchant Shipping Act without seeing that one purpose of the Legislature, which by that section limited a shipowner's liability in respect of certain cases of loss of life, injury or damage, was to make that limitation as absolute, as effective, and as complete as it could be made. The privilege is extended to a foreign owner as well as to a British owner, I presume, because the Legislature saw in the exemption granted to a foreign owner the application of some high maritime policy which it was desirable for this country to give effect to; and when one looks at s. 504, which gives to the owner who is liable the right to have the limitation of the liability made effective, it appears to me that on the construction of that section—which is expressed in the widest terms as regards the power of the Court—it is the duty of the Court to do its best to make that limitation of liability as complete as the Legislature intended that it should be. Of course, the British Legislature has no authority, by any statute that it may enact, over claimants out of its jurisdiction, and unless they come within the jurisdiction it matters not for this purpose whether those claimants are foreigners out of the jurisdiction or are British subjects; but, nevertheless, although the statute cannot by its terms restrict the activities

C. A. 1920

THE KRONPRINZ OLAV.

Younger L.J.

of these persons exercised beyond the jurisdiction of the statute, if it is the purpose of the statute to limit the liability as effectively as possible, it will be, as I read these sections, the duty of the Court, when it can, to make the statute effective over such persons as I have above described. Very similar principles to those which I think apply here are frequently applied in debenture holders' actions in the Chancery Division, where claims in respect of the property to which the debenture-holders are entitled, but which may be situate outside the jurisdiction, are made by persons over whom the Court here has no jurisdiction, and while the Court recognizes that it has no jurisdiction over such persons and perforce has to accept that position, it nevertheless uses any power it has to limit that disadvantage by taking steps to see that if and when those persons come within the jurisdiction they may be made to do such justice in the matter as the Court sees ought to be done. An excellent example both of the Court's limitations and of its functions in such matters is to be found in *In re Maudslay, Sons & Field.* (1)

In this case the Norwegian owners of the *Cuba* have not come into the limitation proceedings, and there is no power to compel them to come into those proceedings, but their claim against the owners of the *Kronprinz Olav* is one which, so far as it is a valid claim, would have been a claim to be brought in under the limitation proceedings and dealt with there, if it had been filed in due time. In respect of that claim not brought in, the plaintiffs in the limitation proceedings, as it appears to me, are powerless. They had to submit to any decree against them which the Norwegian Court may make and enforce, and they must do the best they can with that decree. To my mind they have not and never will have, in respect of that outstanding liability, any claim which as plaintiffs in the limitation proceedings they can bring in those proceedings. The only right or claim that they ever could bring in these proceedings, as it seems to me, would be this: Having paid to the Norwegian owners a claim which might have been brought in the limitation

(1) [1900] 1 Ch. 602.

proceedings here by these owners, the plaintiffs would be entitled, or might be entitled, standing in the shoes of those owners whom they had paid, to make in the limitation proceedings the claim which the owners themselves might have made. But until they have paid something to the owners of the *Cuba*, and until they have got something which amounts to an assignment of the rights of the owners of the *Cuba* as against the fund here, it appears to me that the plaintiffs are not in a position to come forward and by the strength of their own right arm make any claim at all against the fund in the English proceedings. I think the observations of the learned judge in deciding this case are absolutely correct. [His Lordship read the observations of Hill J. set out above and continued :] In my judgment all the observations of the learned judge which I have read, apart from the conclusion which I will refer to in a moment, were well founded, and if there were no more in the case as it is now presented to us by Mr. Dunlop I should, speaking for myself, say that the learned judge's decision was beyond criticism and that it must stand. But Mr. Dunlop has put forward a second line of argument, and, as I read the learned judge's judgment he has not dealt with that at all, and probably it was not before him. I desire now to deal with that part of the case and then to explain why I think that none the less this appeal must be dismissed.

The case that is now made is based on these principles : s. 504 of the Merchant Shipping Act, it is said, gives to the Court the fullest possible discretion with regard to the time which is to be fixed for the bringing in of claims, and in exercising that discretion it is the duty of the Court, remembering the main purposes of ss. 503 and 504, to hold the balance equally between the parties to the limitation proceedings, to see on the one hand that the plaintiffs are not vexed beyond the stated liability that is prescribed by the statute, and on the other hand that in the exercise of its power to protect the plaintiff beyond the amount which the statute fixes as his liability the Court is not delaying unduly the satisfaction of the claims which, to the extent

C. A. 1920

THE KRONPRINZ OLAV.

Younger L.J.

to which the fund in Court will suffice to meet them, have to be satisfied out of that fund. Those are the two rights which the Court has to respect as best it can, and to my mind it has a duty to adjust both of them. The provision with regard to the date which is fixed by the order of the Court, and which under s. 503 has to be fixed, is a class of provision which occurs in many other statutes besides the Merchant Shipping Act, and on a matter in pari materia it occurs among other places in s. 169 of the Companies' Consolidation Act, 1908, where the section is to this effect: "The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved." It has always been the rule that a claim may, notwithstanding that section, be brought in after the time has been fixed, the only disability on the person delaying being that his subsequent claim is not to disturb prior dividends; but with regard to any fund available for distribution he is entitled to his share of it, even to the extent of excluding the other creditors until he has received the same satisfaction as they and notwithstanding that his claim is made late. I apprehend that may well be the position under this statute if the Court, before a fund is distributed, is made aware that there is a claim which is not yet brought forward, which when brought forward will affect the final distribution. The Court in those circumstances ought and would consider that. Now what is the position with regard to the plaintiffs here in that aspect of the case? The plaintiffs in England have been sued in Norway and a judgment has been given against them in the Norwegian Court for a sum which is yet unascertained. There has been an inquiry there to ascertain the precise amount of that liability, and a sum is named which will represent its maximum amount. The plaintiffs might, therefore, in the proceedings here put forward their case from this point of view. They might say: We have not paid anything, so we are not entitled to claim as claimants, but we ask to be allowed to rank against this fund to-day, because the persons to whom we are under liability in Norway have not claimed; we have

not paid and we cannot claim on their account, but nevertheless there is a judgment against us in Norway which, in the course of some period of time which we are not able now to specify, will materialise in a claim against us for a Norwegian sum representing x*l.*, and we ask the Court therefore so to mould or modify the order which has been already made, that, without disturbing the distribution that may be made among the other claimants as regards the balance, there shall be set aside in Court the sum for which we apprehend we shall be liable; if it turns out that we are liable for that sum then we ought to get that out in respect of the Norwegian claim; if, on the other hand, it turns out that we are not liable for that sum then that amount will be distributed among the other claimants, and any costs put upon them by reason of the delay will be compensated by interest which we will pay. That is the proposal made by Mr. Dunlop, and the question is whether, if the learned judge's attention had been called to the case in that way, he ought in the exercise of his discretion to have acceded to that argument. I am not so satisfied as my learned brothers are that the plaintiffs, in making that claim now, are too late. It does not appear to me that anything that has happened in Norway, so far as they are concerned, has delayed the application here. It is not suggested that the proceedings in Norway, so far as the plaintiffs are concerned, have not been carried on as expeditiously as possible. But, nevertheless, I am much impressed by the circumstance to which my learned brothers have drawn attention, and that is the great length of time which has taken place since this collision and the fact that these claimants are still without their money, even limited as it is to the amount paid into Court; and I think, taking all the circumstances into consideration, there has just been that passage of time which, holding the balance equally between the plaintiffs on the one hand and the claimants on the other, requires the Court now to say that the time has come when the claimants ought to get their money.

Accordingly, although my reasons are different from the

C. A.
1920
THE KRONPRINZ OLAV.

reasons stated by the other members of the Court, the conclusion I come to is the same, and I concur in thinking that the appeal ought to be dismissed.

Solicitors for the appellants : *Thomas Cooper & Co.*
Solicitors for the respondents : *William A. Crump & Son.*

E. C. M. T.

1920
Dec. 1.

ADMIRALTY.

THE CITY OF EDINBURGH.

Admiralty—Dockowners—Limitation of Liability—Damage Outside Dock Area—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 *Vict. c.* 32), *s.* 2.

By s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . . performs any duty or exercises any power."

By the negligence of the plaintiffs' servants while engaged on work on the steamship *City of Edinburgh* in the Hornby Dock, belonging to the Mersey Docks and Harbour Board, the vessel and her cargo were damaged by fire, and the plaintiffs were held liable in damages. The plaintiffs sought to limit their liability under the above section on the ground that they were the owners of a dry dock at Garston :—

Held, that having incurred the liability, not as dock owners but as ship repairers, and not within an area over which they exercised any power, the plaintiffs were not entitled to a decree of limitation of liability.

ACTION of limitation of liability.

The plaintiffs were H. and C. Grayson, Ld., ship repairers and the owners of Graysons' Dry Dock, Garston.

The defendants were "the owners of the steamship *City of Edinburgh* and of her cargo, and all other persons claiming to have sustained damage by reason of a fire

1920

THE CITY OF EDINBURGH.

which occurred on the said vessel on or about the 27th day of June, 1918."

The fire in question occurred while the *City of Edinburgh* was lying in the Hornby Dock, Liverpool, belonging to the Mersey Docks and Harbour Board, and was occasioned through the negligence of the plaintiffs' servants while engaged in fitting the vessel with mine defence equipment.

On July 16, 1918, an action was instituted in the King's Bench Division by the Ellerman Lines, Ld., the owners of the *City of Edinburgh*, against the plaintiffs, and on February 17, 1920, the House of Lords, upholding the decision of the Court of Appeal, held that the plaintiffs were liable in damages to the owners of the *City of Edinburgh* for the loss sustained by them in consequence of the fire. (1) A number of actions by the owners of cargo on board the *City of Edinburgh* had also been instituted against the plaintiffs and the plaintiffs had admitted liability.

In these circumstances the plaintiffs claimed a declaration that as dock owners they were entitled under s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, to a decree limiting their liability to an amount not exceeding 8*l.* for each ton of the largest registered British ship which at the time of the damage occurring was, or within the period of five years previous thereto had been within the area over which the plaintiffs performed any duty or exercised any power. The largest registered British ship which came within the terms of the section was the *Bellagio*, whose registered tonnage calculated in accordance with the Merchant Shipping Acts, 1894 to 1906, was 3785.21 tons. The plaintiffs accordingly claimed a declaration that the amount for which they were liable was 30,281*l.* 13*s.* 8*d.* and no more.

The defendants denied that the plaintiffs were entitled to the declaration or the relief claimed.

Butler Aspinall K.C., *Greaves Lord K.C.* and *Noad* for the plaintiffs. It is admitted that the plaintiffs are dock

(1) [1920] A. C. 466.

1920

THE CITY OF EDINBURGH.

owners, and the words of s. 2 are quite plain and unambiguous—"the owners of any dock . . . . shall not be liable. . . . ." There is no limitation as to place except in the latter part of the section, which deals with the question as to how the limitation is to be calculated. The Legislature obviously intended to give dockowners the same relief as is given to shipowners, presumably on the ground that an act of negligence on the part of a servant over whose action they have no control may cause so much damage that the employer would be ruined if he were liable in full; the fact therefore that the damage was occasioned elsewhere than in the plaintiffs' own dock is immaterial. It is not for the Court to read into an unambiguous section words which would limit the effect of the section: see Maxwell on Interpretation of Statutes, 6th ed., ch. 9. If the effect of the plain meaning of the section is to give relief where it was not intended, that is a matter for the Legislature.

A. T. Miller K.C. and *James Dickinson* for the defendants. The section does not give relief where the damage is occasioned outside the area over which the dockowner exercises control and where the negligence was not that of the servants of the dockowners qua dockowners. In the present case the plaintiffs were executing work as ship repairers in Liverpool, and the fact that they happen to own a dock elsewhere is irrelevant.

[They were stopped.]

HILL J. This is a novel application for limitation of liability. I do not mean merely novel because it is brought by somebody not a shipowner, and is brought under s. 2 of the Merchant Shipping Act, 1900, but it is novel because of the extraordinary results which would follow from my accepting the contentions of the plaintiffs.

The steamship *City of Edinburgh* was lying in the Hornby Dock, Liverpool. The Hornby Dock is one of the docks belonging to the Mersey Docks and Harbour Board, and is situated several miles from Garston. The plaintiffs were

1920

THE CITY OF EDINBURGH.

HILL J.

engaged in work upon the *City of Edinburgh* as she lay in the Hornby Dock. By the negligence of their servants the *City of Edinburgh* was set on fire, and it has been finally determined by the House of Lords (1) that the plaintiffs are liable for the damage so caused. The plaintiffs are Messrs. H. and C. Grayson, Ld., the well-known firm of ship repairers, who had received instructions which were addressed to their North End Works, Liverpool, to do the work. The plaintiffs also have works at Birkenhead and at Garston, and at Garston they have a dry dock.

By this action they seek to limit their liability for damages caused by negligence for which they are responsible—negligence happening in the Hornby Dock. They seek to limit that liability by saying that they are entitled to the benefit of s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which limits the liability of, among other people, dockowners, to damages ascertained on the basis of the "tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which" the dockowner "performs any duty or exercises any power." The contention for the plaintiffs is that the words of the section are plain: that however absurd the results of the construction they seek to put upon the section, it is not for the Court to disregard the plain meaning of the words; it is for Parliament to set them right.

The section is as follows: "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the

(1) [1920] A. C. 466.

1920

THE CITY OF EDINBURGH.

Hill J.

period of five years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power." Then there are some words which apply only to harbour authorities and conservancy authorities. By sub-s. 4 the term "dock" is to include: "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties"; and by sub-s. 5 the owner of the dock shall include "any person or authority having the control and management of any dock or canal."

There is no doubt that the plaintiffs are the owners of a dock within the meaning of s. 2, because they own a dry dock and have the management of that dock. But are they under this section entitled to the limitation of liability therein prescribed in respect of liability which they have incurred not at or near or in any way connected with their dry dock, but while they were performing work as ship-repairers upon a ship miles away from their dock? As I pointed out in the course of the arguments, if the plaintiffs' contention is right, they would be equally entitled to the limitation of liability if they were doing ship repairs to a ship at Pernambuco or at Singapore. And, indeed, if instead of owning a dry dock at Garston they owned a slip, or even a jetty, they would be entitled to a limitation based upon the tonnage of the largest registered British ship which had ever been on that slip or at that jetty. It would be a very economic form of insurance against liability for anybody who was connected with ships, and likely by himself or his servants ever to do any damage to those ships, to maintain a jetty or a slip whereat the largest British registered ship that could come there should be of the least possible tonnage; he would reduce his liability under this section to a minimum. The result of the contention for the plaintiffs is so absurd that unless I am absolutely forced by words that I cannot get out of, I am not going to suppose or to hold that Parliament intended anything of the kind.

I start with this: this statute, like all other statutes of limitation, limits the common law right of an injured person, and therefore is to be construed strictly against the person who sets it up, in the sense that it is to be carried no further than the plain words of the statute necessarily import. For that principle of construction I may refer to *Gale* v. *Laurie* (1), which had reference to one of the old Merchant Shipping Acts (53 Geo. 3, c. 159). Do the words of the section necessarily import that which the plaintiffs contend? The section deals with liability and limits it. Liability of whom? Of dockowners, canal owners, and so on. In fixing that liability it has regard to an area—namely, the area over which the dockowner "performs any duty or exercises any power." I see nothing in the section to compel me to say that a person who becomes liable, not because he is a dockowner or because the ship is at the time in the area of his dock or at or near the dock—the place in which he "performs any duty or exercises any power"—is entitled to limit his liability on the mere ground that he happens to own a dock or a quay or a pier or a jetty at the same time. It seems to me it would reduce the Act to an absurdity if I were so to hold. The liability is one which Messrs. Graysons incurred as ship repairers, not as dockowners, nor at or near their dock. It is a mere accident qua that liability that they happen to own a dock.

I am satisfied that no interpretation of the section drives me to the conclusion that because the plaintiffs happened to own a dock at the same time that they incurred a liability neither as dockowners nor within the area of their dock, they are entitled to limit their liability. I therefore dismiss the action with costs.

Solicitors for the plaintiffs: *Weightman, Pedder & Co.*
Solicitors for the defendants: *Hill, Dickinson & Co.*

(1) (1826) 5 B. & C. 156.

E. C. M. T.

C. A.
1920
Dec. 1, 2.

[IN THE COURT OF APPEAL.]

THE KARAMEA.

Admiralty—Collision—Navigation of Entrance to Montevideo Harbour—Rounding the Whistle Buoy—"Keep course and speed"—Whistle Signals—Both to blame—Apportionment of Blame—Discretion to review Apportionment—Regulations for Preventing Collisions at Sea, arts. 19, 21, 27 *and* 28—*Maritime Conventions Act,* 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 1.

When a judge sitting in Admiralty has apportioned the blame between two wrong-doing vessels in accordance with the provisions of s. 1 of the Maritime Conventions Act, 1911, the Court of Appeal if it agrees with him on the facts will not lightly interfere with his discretion as to the apportionment of blame; but if the appellate tribunal differs with him on the facts, and finds that one of the vessels was more blameworthy as regards matters in respect of which she was not held to blame in the Court below, it is bound to review the decision as to the apportionment of the blame.

The defendants' steamship *K.*, outward bound from Montevideo, when approaching the Whistle buoy off the entrance to the harbour, sighted on her port bow the green light of the plaintiffs' steamship *H.*, inward bound. The two vessels were on crossing courses, and therefore under art. 19 of the Sea Regulations it was the duty of the *H.* to keep out of the way, and, under art. 21, the duty of the *K.* to keep her course and speed. When the vessels were about two miles apart the *H.* ported a little but did not blow a helm signal. The porting brought the *K.* finer on the *H.*'s starboard bow and a little later the *K.* crossed the bows of the *H.* and brought the vessels port to port. When she had the Whistle buoy abeam on the starboard hand the *K.* starboarded to make the outward turn in the channel leading to the sea. The two vessels came into collision.

Hill J. held that there were no "special circumstances" (art. 27) which relieved the vessels on sighting each other from obeying the crossing rule, or which entitled the *K.* to say that in starboarding at the buoy she was in fact keeping her course round the bend in the channel. He therefore held the *K.* to blame. He absolved the *H.* from blame for not sounding a helm signal when she ported, on the ground that it would not have been heard by those on the *K.*, but held the *H.* to blame for not reversing her engines when a position of danger was brought about by the starboarding of the *K.*, and he pronounced the *K.* three-fourths to blame and the *H.* one-fourth. The owners of the *K.* appealed and a cross-appeal was entered by the owners of the *H.*:—

Held, confirming the decision of Hill J., that the crossing rule applied and that both vessels were to blame, but that the *H.* was to blame not only for not reversing her engines but also for not blowing her whistle when she ported, as it might have been heard by those on the *K.* and have acted as a warning not to starboard; and that the proportions of blame, therefore, should be varied by holding both vessels to blame in equal degrees.

Decision of Hill J. [1920] P. 314 varied.

C. A. 1920

THE KARAMEA.

APPEAL AND CROSS-APPEAL from a decision of Hill J. in an action of damage by collision.

The plaintiffs were the owners of the Norwegian steamship *Haugland*, the defendants were the owners of the British steamship *Karamea*. The collision happened on the night of February 12, 1919, to the southward and eastward of the Whistle buoy off the entrance channel to Montevideo. The *Haugland*, a steamship of 3194 tons gross, in ballast, was inward bound, and the *Karamea*, a steamship of 5627 tons gross, laden, was outward bound.

The two vessels were approaching the Whistle buoy on crossing courses, the *Haugland* having the *Karamea's* red light 3 to 4 points on the starboard bow. The *Haugland* ported, but not so as to immediately bring the vessels red to red. When she ported the vessels were about two miles apart, and she did not sound a port helm signal, because, according to the evidence of the officer in charge, he did not think it would have been heard. After porting she still had the *Karamea's* red light a little on the starboard bow and only got the red light on to the port bow by reason of the *Karamea* drawing across the *Haugland's* bows. When she had the Whistle buoy abeam, instead of keeping her course as required by art. 21 of the Sea Regulations, the *Karamea* starboarded to make the turn outwards from the channel to sea. It was contended on behalf of the defendants that having regard to the bend in the channel the *Karamea* was justified in starboarding, and that she was in fact keeping her course in so doing.

Hill J. held that, although when no action had to be taken for any other vessel, the buoy might be a convenient point at which to make the turn, there were no "special circumstances" (art. 27) which relieved the vessels on sighting each other from obeying the crossing rule, or which entitled the *Karamea* to say that in starboarding at the buoy she was in fact keeping her course round the bend in the channel. He therefore found the *Karamea* to blame. On the ground that the ships were too far apart for the whistle to have been heard he absolved the *Haugland* from blame for not sounding

C. A. 1920

THE KARAMEA.

a port helm signal, but he held her to blame for not reversing her engines when a position of danger was brought about by the starboarding of the *Karamea*. Under these circumstances his Lordship held that the main fault for the collision rested with the *Karamea*, and he pronounced her three-fourths to blame and the *Haugland* one-fourth to blame.

The defendants appealed and the plaintiffs gave notice of cross-appeal. The arguments sufficiently appear from the judgments.

Bateson K.C. and *Alfred Bucknill* for the appellants.
D. Stephens K.C. and *Dumas* for the respondents.

LORD STERNDALE M.R. This is an appeal from a decision of Hill J. in which he held both the vessels to blame. I agree that both vessels were to blame, and therefore so far as that goes I agree with the learned judge. But there is another question which arises. Hill J. held the vessels to blame, the *Karamea* in the proportion of three-fourths and the *Haugland* one-fourth, and it has been argued before us for the appellants that even if both vessels are to blame these proportions are wrong. It was argued for the respondents, the owners of the *Haugland*, however, that although we might differ from the learned judge, we could not, unless we differed from him on a principle of law, or at any rate ought not, to interfere with his judgment as to the proportions of blame. I cannot follow that contention. If we agree with the learned judge on the facts and come to the same conclusion as to the actions of the two ships, I think it would need a very strong case indeed to induce this Court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it. But if we differ from the learned judge on the facts as to the actions of the two ships and find that one of them was more to blame in regard to matters which actually had something to do with the causing of the collision, it seems to me that we are not only at liberty but that we are bound to review his decision as to the proportions of blame, because if his

decision is formed upon a judgment as to the actions of one of the vessels with which we do not agree it is obvious that the very elements on which he formed his decision are disturbed.

I will now very shortly state the facts of the case, and our decision upon them. The two vessels were approaching and were near the port of Montevideo. The *Karamea* was coming out of the port and was navigating parallel with the line of the buoys. She had got practically to the last of the buoys and was making for the Whistle buoy, which is further out, and by the time of the collision she had got somewhere up to that buoy. At the Whistle buoy she turned under a starboard helm in order to go to the eastward. The *Haugland* was coming westward and intending to go into the port. She had passed Torres Island about four miles off, leaving it on her starboard hand, and she also was making for the Whistle buoy and intended to turn there. She would have turned there under a port helm and have gone into the port of Montevideo.

As the *Karamea* was coming down towards the Whistle buoy, and as the *Haugland* was approaching it in the way I have described, the port light of the *Karamea* would be on the starboard side of the *Haugland* when those on the *Karamea* saw the *Haugland's* starboard light. They were therefore crossing ships, and the crossing rule would apply unless there were something in the circumstances of the case to prevent the application of that rule. I am clearly of opinion that there was nothing to prevent the crossing rule applying. There is no question of narrow channel—that is admitted—and the only thing that could be said was that it was the practice of ships to turn under starboard helm at the Whistle buoy if they were outward bound and going eastward. If they were bound into the port the turn under port helm would be made somewhere about the Whistle buoy. But even if this were a regular and recognized turning point I think there is authority for saying that that circumstance does not prevent the crossing rule from applying, and in this case any such ground for the rejection of the crossing rule

C. A. 1920

THE KARAMEA.

Lord Sterndale M.R.

seems to me to be disposed of by the evidence of the master of the *Karamea* himself, who said that it was not necessary to make the turn at that point although they generally turned there. There was no other ship and there was nothing in the state of the weather to prevent an outward bound ship going further to the south of the Whistle buoy and starboarding there if it was a right and proper thing to do. It seems to me therefore that there is no doubt that the crossing rule applies and accordingly it was the duty of the *Karamea* to keep her course and speed and of the *Haugland* to keep out of the way of the *Karamea*.

The *Karamea* undoubtedly did not keep her course and speed. She starboarded at the buoy as she intended to do to make her course to the eastward, and I can see no reason for saying that she is not to blame for so doing. But there is a considerable conflict as to the way in which the collision happened. [His Lordship dealt with the respective cases and said that he saw no reason for differing with Hill J. on his conclusions as to what in fact happened and continued :] The learned judge, under those circumstances, of course held that the *Karamea* was to blame. But he has also held that the *Haugland* was to blame on the ground that when she saw what the *Karamea* was doing, instead of reversing she still continued full speed ahead under a hard-a-port helm. I think his decision was right in that respect also. It was a wrong manœuvre of the *Haugland*, but it took place at the last moment and at a time when the *Karamea* had put the *Haugland* in a position of very considerable difficulty, and holding that to be the only respect in which the *Haugland* was to blame, he considered that one-fourth of the blame only was attributable to her.

But there was another case made against the *Haugland*, which the learned judge rejected, and that was this : When she sighted the *Karamea* she ported, I think she says half a point, but at any rate it was a very slight porting ; she did not port sufficiently to open her red light at once to the *Karamea*. She brought the *Karamea* very much finer on her starboard bow, but she did not actually get her on the

port bow at that moment, and she trusted to the *Karamea* keeping her headway and crossing the *Haugland's* head in order to get the position of red to red which was afterwards produced. She was then at a distance of about two miles. She did not blow her helm signal and I can see no excuse for that omission. If she had been altering simply for her own navigation there would be something to be said for it, but admittedly she was altering not only for the buoy but also for the *Karamea,* and therefore under the strictest definition of vessels " in sight of one another " the *Karamea* was in sight of the *Haugland* for the purposes of manœuvring, and the *Haugland* was manœuvring for her. In these circumstances the rule is express that the vessel which is acting ought to blow the appropriate helm signal, and the only reason given for not doing so in this case was that the *Haugland* was so far off—about two miles—that the *Karamea* could not possibly have heard the signal and therefore it was no use blowing. The wind was not blowing strongly but was blowing from the *Haugland* towards the *Karamea.* Of course it is very difficult to say how far a whistle can be heard unless the nature of the whistle is known. But we are advised, and I think our experience also teaches us, that two miles is not by any means an impossible distance for a good whistle to be heard ; the distance between the vessels therefore does not seem to me to be any reason for not whistling.

What is said against the *Haugland* is that she by her action contributed to the collision because she misled, or at any rate might have misled, the *Karamea* into thinking that she was not going to alter for her and therefore that the *Karamea* might safely alter and continue on her course under the starboard helm. The Elder Brethren advised the learned judge that the absence of the whistle, and the slight porting and not showing the red light, were not matters in respect of which the *Haugland* could be held to blame. We have asked our assessors and I regret to say that on the second point they do not entirely agree—namely, whether the *Haugland* ought at once to have opened her red light and not trusted to the *Karamea* crossing her bow in order to get the

C. A. 1920

THE KARAMEA.

Lord Sterndale M.R.

vessels red to red. If I had to decide I think I should say that in the circumstances it is better for a ship in the situation of the *Haugland* to emphasize her position at once, as she is the ship which has to alter for the other ; but I do not think it necessary to come to a conclusion because both our assessors are of opinion that the *Haugland* altering as she did ought to have given a helm signal, and they see no reason in the circumstances—so far as they are in a position to judge without knowing exactly the nature of the whistle—why it should not have been heard by the *Karamea*. Taking these two things together I cannot see how the *Haugland* can be held not to blame for her manœuvres at that time. Had she at once opened her red light there certainly would have been a better chance of the *Karamea* being warned that she must not starboard. It ought not to have been necessary to warn her, because, under the rules, she had no right to starboard. Had she heard the helm signal she would have had a greater chance after being warned of correcting that manœuvre, although the distance was considerable. But as the *Haugland* omitted both to open her red light at once and to give any sound signal that she was acting for the *Karamea*, I cannot help differing from the learned judge when he says that she was not to blame for that earlier manœuvre. If she were, it seems to me that it is a fault which might very well and very likely did contribute to the collision, because it deprived the *Karamea* of the warning that she otherwise would have had which might have induced her to correct her wrong manœuvre. She did not get the warning and she did not correct the wrong manœuvre. She came on wrongly, and the *Haugland* also acted wrongly at the last ; they were both continuing their wrong action up to the time of the collision ; and therefore it seems to me that in these circumstances the *Haugland* is more to blame than the learned judge thought that she was. We have to see, therefore, whether we think in the altered circumstances thus produced the proportions that the learned judge has stated should be maintained. I do not think they should. In my opinion, in the circumstances that we think

are correct there is no reason for apportionment except according to the half and half rule, and that is the judgment that ought to be given.

There was an appeal and a cross-appeal. The appeal has failed substantially but has succeeded on a minute point so far as this Court is concerned—although it may not be minute from the monetary point of view—and the cross-appeal has not succeeded at all. Accordingly, I think there should be no costs of this appeal.

WARRINGTON L.J. I am of the same opinion. The judge in the Court below has found both vessels to blame. He has apportioned the blame in the proportion of three-fourths to the *Karamea* and one-fourth to the *Haugland*. He has arrived at that proportion by finding the *Haugland* to blame in reference to one act on her part and one act only. It is contended on behalf of the *Karamea* that the *Haugland* was also to blame for default at an earlier stage in her manœuvres, and we are accordingly asked, if we come to that conclusion, to vary the apportionment. With regard to that I only desire to say this: It is conceded by Mr. Stephens that if the method of apportionment adopted by a judge is determined by his conclusions on a point of law, then if this Court differs from him in the conclusion at which he arrives there is no question that it has the right to alter the apportionment at which the learned judge has arrived. I can see no distinction between that case and the case in which the conclusion of the learned judge has been determined by his finding of fact and this Court differs from him in that finding. It seems to me that in either of those cases this Court necessarily arrives at a conclusion not merely that the apportionment is wrong but that the method by which the apportionment is arrived at is not the correct method; and in that case I see no reason why this Court should not vary the apportionment. It may well be and probably is the case that if the Court arrives at the same conclusion both on the facts and in law it would not interfere merely because the learned judge in his discretion has

C. A. 1920

THE KARAMEA.

Warrington L.J.

given proportions which this Court thinks it would not have given. That is another matter altogether. But there may well be an apportionment that depends on either a conclusion of law, or a conclusion of fact, in which this Court differs, and then it seems to me there is no objection to its altering the apportionment.

With regard to the substantial question, the learned judge has found, as I have said, both ships to blame. The collision happened on a fine night about 10 o'clock not far from the entrance to Montevideo Harbour. It was a quiet night with a fresh or moderate breeze from the east, which is not unimportant. Neither ship was hampered by any difficulty of navigation. It was, so far as this case is concerned, open water. There is no narrow channel or anything of that kind to interfere with the manœuvres of either ship, nor was there any ship in the immediate neighbourhood to interfere. So far as all those circumstances were concerned, each ship was free to so manœuvre as to insure her own safety and the safety of the other ship. The *Karamea* was leaving Montevideo Harbour, and the course which those in charge of her laid down for themselves was to go to the southward as far as the Whistle buoy, and having arrived at that buoy to leave it on the starboard beam and then make an 8 point turn to the eastward and so go to sea. The *Haugland* was approaching the port, and she also was on the particular course which she had laid down for herself, approaching the Whistle buoy from the east—speaking quite generally—intending also to pass it, leaving the buoy on the starboard side and then to turn northward and so make for the harbour. Both ships, therefore, appear to have been steering for the buoy. The learned judge has found that they were crossing ships, and that it was the duty of the *Karamea* to maintain her course and speed and that it was the duty of the *Haugland* to give way to the *Karamea*. With that finding there is in my opinion no reason to differ. The *Karamea* did not maintain her course and speed; having arrived at the buoy she pursued the same course that she had intended to pursue and proceeded to make her 8 point turn. She therefore

was clearly to blame and with that finding of the learned judge there is no reason to differ.

Now with regard to the *Haugland*, the *Haugland* saw the *Karamea* coming out of the harbour before she had reached the Whistle buoy and while she was still on her southward course, and the officer in charge of the *Haugland* gave the order to port his helm, as he says partly because he thought he was a little too much to the southward of the buoy, but also more than he would otherwise have done—he says "more than usual," but what he means, I think, is, more than he would for that purpose have done—because of the *Karamea*. He therefore did what was quite right, he altered his course slightly under a port helm in reference to the position of the *Karamea*. But it was a very small alteration, and he failed to give the port helm signal because he says he thinks it was too far off to be heard. According to him he estimates the distance at that time at from 1½ to 2 miles. Later on, when the *Karamea* had begun her right-angled or 8 point turn, a turn which she was making very slowly and gradually, because she was dragging in the mud—a common circumstance in those waters—she did in the very early part of the making of that turn, show her red light to the *Haugland*. They were for a short time red to red. But the *Karamea* continued to turn, with the result that the two vessels came into collision, the *Karamea* running into the port side of the *Haugland* nearly at a right-angle, the *Haugland* being then under a hard-a-port helm and not having reversed her engines.

Now what has been said on behalf of the *Karamea* is that the *Haugland*, when she originally ported her helm partly with a view to the *Karamea* as well as to the buoy, ought to have gone more decidedly under a port helm so as to indicate to the *Karamea* that she understood that it was her duty to give way, and so have told the *Karamea* that she was expected to maintain her course and speed; and that if she had done so the collision might very well not have occurred. Further, it is said that the *Haugland*, when she ported her helm, ought to have given the port helm signal. That she

C. A. 1920

THE KARAMEA.

Warrington L.J.

did port her helm there is no question on the story of the *Haugland* herself, nor is there any question that she failed to give the port helm signal. The only reason for not giving it is that she thought that the *Karamea* was too far off. The learned judge asked the Elder Brethren who were assisting him whether they thought that the *Haugland* under the circumstances had done all that was necessary for keeping clear by taking the action that she did, and the Elder Brethren advised him that they thought that she had. We have consulted our assessors on that point, and they do not altogether agree. One of them thinks that the *Haugland* did what was necessary, and that it was not incumbent upon her to make a more decisive turn to port than she actually did. The other does not take that view, but they both agree that there was no excuse for her having failed to give the port helm signal. It is unnecessary to say with which of the two views as to the helm action of the *Haugland* I agree or disagree, but I must say this, that looking generally at what happened on this night I think both ships were bent too much upon maintaining the course which had been laid down for each before the circumstances of danger arose, and did not take sufficient account of the position of the other ship and the possible risks of collision, and if I had to decide it —though I say so with great hesitation—I think I should say that the *Haugland* was to blame for not having taken a more decisive course under port helm. But as I say, it is unnecessary to decide that, as I think there is no doubt that she was to blame for not having given the signal. It comes to this therefore, that the learned judge, having found that the *Haugland* was to blame for one fault only—namely, that of not having reversed her engines and continuing to go ahead at full speed under her hard-a-port helm, we come to the conclusion that the *Haugland* was further to blame at an earlier stage in the proceedings. Having arrived at that conclusion, I agree that the best course to pursue is to treat both vessels as to blame and not to make any apportionment except that the damages be divided. With regard to the costs I agree with what the Master of the Rolls has said.

C. A. 1920

THE KARAMEA.

SCRUTTON L.J. I agree and I do not propose to repeat in detail the manœuvres stated by my brethren. I only desire to add a few words to make clear my own views of the effect of the rules on this case. The *Karamea* was coming south out of Montevideo but at a certain point would turn east in order to go to sea, going at right angles. The exact point at which she would turn was not settled by any physical object. She might have turned before the Whistle buoy. She might have turned somewhere south of the Whistle buoy. The *Haugland* was coming in from the sea on a westerly course and would at a certain point turn again at right angles to get into Montevideo; and again the exact point at which she would turn was not fixed by the physical conditions; each ship would turn somewhere in the neighbourhood of the Whistle buoy, but had no particular point settled for that either by a rule or by any physical conditions. Under those circumstances what is the bearing of art. 19? That article says: "When two steam vessels are crossing so as to involve risk of collision"—I think the authorities have settled that one has to consider whether the ships are crossing some time before they cross, or, as has been put by a learned judge now dead, who used to practise in the Admiralty Court: "So as to involve risk of collision" means "so as to involve risk of risk of collision." Looking some way back you consider the courses prolonged in a straight line and see if they cross, and if they cross you see whether at the line of intersection the two ships will be somewhere near one another, and if you find that to be the state of things, then prima facie the ship which has the other on her own starboard side must give way. There is an exception to that when another rule comes in, and the courses of the ships are prescribed by physical conditions such as that of a narrow channel, so that though the courses if prolonged would cross, the position and the rules settle that the courses will not cross because each ship will keep on the starboard side of the narrow channel; when that is the position art. 25 and not art. 19 applies.

The present facts raise a sort of half-way case, where it

C. A. 1920

THE KARAMEA.

Scrutton L.J.

is known that each ship is going to alter her course about the same place, but there is nothing that definitely settles where they will alter their course. They may go a little further before altering their course in each case. That is the sort of thing that constantly happens at sea when the ordinary practice is to make for a lightship, a buoy, or a headland and then to alter course. In my view in circumstances like that, which is the present case, the crossing rule applies and the courses ought to be taken as prolonged and the burden of keeping out of the way put on the vessel which has the other on the starboard side. If that is acted upon it avoids the difficulties that would otherwise arise, particularly at night, and which did arise in this case, when in doubt as to which ship is going to make the alteration in her course which you know is going to be made at some time but as to which you are not sure exactly when it will be made. But it appears to me that you are in a somewhat ambiguous position because you know the prolonged course is not really the course the other ship is going to make, and that imposes on the give-way ship the obligation of good seamanship of making clear what she is going to do. There may be an ambiguous position under those circumstances because the stand-on ship may think the other ship does not understand the stand-on rule "and so I shall be safe to make an alteration which I am going to make anyhow, and which she knows I am going to make." That puts upon the give-way ship the obligation of clearly giving way and giving the stand-on ship the clearest indication she can that she is treating herself as the give-way ship and means to get out of the way. I am disposed to agree with what I think would have been the view of the learned judge if he had not been advised by his assessors and with what is the view of one of our own assessors, that the *Haugland* ought to have ported more decisively and shown her red light sooner and so made clear to the *Karamea* that she was treating herself as the give-way ship, and getting out of the way. I agree however that is a point of some difficulty, and I can quite understand a difference of opinion about it, but I have no difficulty whatever about

the second point, as to neglecting to give the signal that she was altering her helm. The rule is that when vessels are in sight of one another a steam vessel under way in taking any course authorized or required by the rules shall indicate that course by certain signals. Very properly of course an interpretation has been put upon the words "When vessels are in sight." It does not mean that if with a glass you descry a vessel in sight on the extreme horizon you must blow a sound signal which she may possibly not hear; it means, and has been interpreted to mean, when the vessel may be treated as being in sight and affected by the manœuvre you are taking. The language used by Lord Alverstone in his judgment in *The Bellanoch* (1) is " in sight with reference to the manœuvres which a vessel is authorized or required to take, having regard to the other vessel approaching, for the purpose of avoiding collision." If that limitation—which appears to me to be a very proper limitation—is put on art. 28, then it is quite clear that one of the purposes for which the *Haugland* was taking this alteration of course was to avoid the other ship, and anyhow the other ship might think she was manœuvring for that purpose. Under those circumstances it seems to me to be quite clear that it was the duty of the *Haugland* to indicate by her whistle that she was porting in order that the *Karamea* might have notice of that fact and shape her course accordingly. The excuse put forward for the *Haugland* seems to me to be futile. It does not matter that the signal you are giving may not be heard; you must give it and if it can be heard so much the better for the other ship.

The only other point I desire to mention is that I entirely agree with my brethren in this, that if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships; but when the Court of Appeal takes a different view of fact or law from that taken by the learned judge, and finds certain

(1) [1907] P. 170, 181.

C. A. 1920

THE KARAMEA.

Scrutton L.J.

matters blameworthy which he has not found blameworthy at all, it appears to me there is not only no objection to the Court of Appeal altering the proportions but that it is bound to alter them, because of the extreme probability that, if the learned judge had taken the same view of the facts as the Court of Appeal, he would himself have taken the Court of Appeal's view as to the proportions of blame.

For these reasons I agree with the judgments already pronounced.

Judgment of the Admiralty Court varied.

Solicitors for the appellants : *Ince, Colt, Ince & Roscoe.*
Solicitors for the respondents : *Thomas Cooper & Co.*

E. C. M. T.

1920
Nov. 2, 3, 4
Dec. 20.

ADMIRALTY.

THE KENORA.

Admiralty—Salvage—Misconduct of Salvors—Larceny by Master and Crew—Forfeiture of Salvage—Effect on Owners of salving Vessel.

The criminal misconduct (larceny of stores and effects) of the master and crew of a vessel engaged in rendering salvage services does not forfeit or diminish the award to the owners of the vessel who have not by their negligence enabled the misconduct to take place and are in no way privy to it.

CONSOLIDATED ACTIONS of salvage.

The plaintiffs were the owners, master and crew of the steam tugs *Assistance* and *Margaret Ham ;* the owners, master and crew of the steam trawler *Nérée ;* the owners, master, officers and crew of the steamship *City of Sparta ;* the owners, master and crew of the steamship *Algerian Prince ;* and Richard Powell, a Swansea pilot. The defendants were the owners of the steamship *Kenora*, her cargo and freight.

The *Kenora* was a steel screw steamship of 1955 tons gross of the port of Toronto manned by a crew of 23 hands. She was of the value of 110,000*l.* ; her cargo was of the value of 3988*l.* ; and the freight at risk 1975*l.*

1920

THE KENORA.

The plaintiffs claimed salvage remuneration for services rendered to the *Kenora* between January 28 and February 4, 1920, when she had burst her condenser and disabled her main engines in the course of a voyage from the Tyne to Cork.

The services fell into two groups. First, services by the *City of Sparta* and *Algerian Prince* in standing by in bad weather and sending out wireless messages for assistance, and, in the case of the *City of Sparta*, towing for a short time until the hawsers parted. Secondly, services rendered after the *Kenora* had been abandoned by her crew off Lundy. These services consisted in bringing the *Kenora* into dock at Swansea, and were rendered by the Belgian trawler *Nérée*, the tugs *Assistance* and *Margaret Ham*, and pilot Powell.

The defendants admitted that salvage services were rendered by the various plaintiffs, but pleaded that by reason of misconduct the owners, master and crew of the *Nérée* were not entitled to any salvage award. The particulars of misconduct (inter alia) were that a number of the storeroom doors, cupboards, etc., on the *Kenora* had been forced open and their contents rifled; the Yale locks on the officers' cabins had been forced and the contents of the cabins, including private effects, looted; and a quantity of ship and engine room stores were missing.

L. Batten K.C. and *Noad* for the owners, masters and crews of the *Assistance* and the *Margaret Ham*.

Butler Aspinall K.C. and *A. E. Nelson* for the owners, master and crew of the *Nérée*.

E. W. Brightman for the owners, master, officers and crew of the *City of Sparta*.

J. B. Aspinall for the owners, master and crew of the *Algerian Prince*.

Dumas for Richard Powell.

Bateson K.C., *E. Aylmer Digby* and *Bodilly* for the defendants.

It was contended on behalf of the defendants that it was against public policy to award salvage to persons guilty of misconduct, and that the owners of the *Nérée*, as well as her

1920

THE KENORA.

master and crew, should be deprived of their award if the Court found the charge of misconduct established. *The Blenden-Hall* (1); *The Scindia* (2); *The Kolpino* (3); *The Duc d'Aumale* (4); and *The Clan Sutherland* (5) were referred to.

For the owners of the *Nérée* it was contended that the master and crew were not acting as agents of the owners who had no knowledge of, and were in no way privy to, the alleged criminal acts; and that in none of the cases cited by the defendants had it been held that criminal misconduct on the part of the crew affected the owners. In *The Scindia* (2) the Vice-Admiralty Court at Cape Town held that the misconduct of the master in improperly removing goods from a derelict affected the crew but not the owners, a decision expressly on the point; and in *The Duc d'Aumale* (4), where the owners and the crew were deprived of their award on the ground of public policy, it was the negligent navigation of the master which created the necessity for the salvage services. No grounds of public policy operated in the present case to deprive the owners of their award.

Cur. adv. vult.

Dec. 20. HILL J. read the following judgment:—

[After dealing with the first group of salvors' services, in respect of which his Lordship awarded 1000*l.* to the owners, master and crew of the *City of Sparta* and 1000*l.* to the owners, master and crew of the *Algerian Prince*, the learned judge set out the circumstances under which the *Kenora* was abandoned by her crew off Lundy Island, and continued as follows:] On February 3 the first of the second group of salvors appeared on the scene, the *Nérée*, a steam trawler of 236 tons gross, carrying a crew of thirteen hands. The others were the tugs *Assistance* and *Margaret Ham* and Mr. Powell, a Swansea pilot.

The *Nérée* sighted the *Kenora* about 1.20 P.M. on February 3 and went to her. The mate and three men boarded her.

(1) (1814) 1 Dods. 414.
(2) (1865) 2 M. L. C. (O. S.) 232.
(3) (1904) 73 L. J. (P.) 29.
(4) [1904] P. 60.
(5) [1918] P. 332.

1920

THE KENORA.

Hill J.

They cut the *Kenora's* anchor chains and made fast the *Nérée's* trawl warps, and at 6.30 P.M. the *Nérée* began an attempt to tow. At 10.30 P.M. the warps parted and the men on board the *Kenora* returned to the *Nérée*. The *Nérée* stood by till 3 A.M., when the mate and three men went back to the *Kenora*, and were making fast again when the tugs *Assistance* and *Margaret Ham* arrived. Thereafter the tugs made fast ahead and the *Nérée* astern and together they brought the *Kenora* to Swansea. At the dock entrance the tugs cast off. But the *Nérée* remained in attendance till the *Kenora* was, after some delay not sufficiently explained, handed over to the receiver of wrecks. It was contended for the defendants that the *Nérée* did nothing of value until the tugs arrived, and could have done nothing without the tugs, and that she rather increased the danger to the *Kenora* by casting her adrift from her anchors. I am not so advised. [The learned judge dealt at length with the services, which he said rescued the *Kenora* from total loss, and continued:] I award to the *Assistance* the sum of 2200*l.*, and to the *Margaret Ham* 2800*l.*

The *Nérée* has put forward a most exaggerated claim for damage to gear and loss of fishing. If I allow for boat warps and repairs and expenses at Swansea 550*l.*, I shall treat the *Nérée* very liberally. As to loss of fishing, which is put at 1800*l.* for one week, it is in my view absurd. The time is exaggerated and the rate of earnings. There was no need for the *Nérée* to remain at Swansea as she did, she could have handed over the *Kenora* to the receiver of wrecks at once and gone about her fishing. If I allow three days over and above the time actually occupied in the towage to Swansea I shall treat the *Nérée* liberally. As to the rate of earnings, no books or accounts were produced. I have nothing but the evidence in Court, and I test that by my experience of trawler earnings in general. If I allow 350*l.* on this head, I am again treating the *Nérée* very liberally. I therefore add the sum of 900*l.* to the amount I should award for the salvage which I should put at 2500*l.* This would make a total of 3400*l.*, and that is the sum I should award

1920

THE KENORA.

Hill J.

the owners, master and crew of the *Nérée* apart from the charge of larceny which remains to be considered.

But before I deal with that, I will dispose of the claim of the pilot, Mr. Powell. I regard his service as of great value. He boarded the *Kenora* off Swansea. He piloted her in, arranging the disposition of the tugs. But he rendered a much more important service, for it was due to him that the ship was permitted to enter dock at all instead of being beached. And he only obtained that permission upon his personal responsibility, and at the certain cost of forfeiting his pilot licence if things had gone wrong. He deserves a substantial award. I fix it at 400*l.*

What remains to be considered is a charge of larceny against the master and crew of the *Nérée*. I regret to say that I find this charge established. When the master and crew of the *Kenora* left her on February 1 they left hurriedly and took nothing with them. The master and two engineers and the owner's superintendent were permitted to go on board on the 6th in Swansea. During the interval the ship had been at anchor till the 3rd with no one on board, so far as the evidence goes, and thereafter in the possession of the master and crew of the *Nérée*. During the period of February 1–6 the doors of the officers' quarters forward and aft had been forced open and most of the officers' effects stolen, a large quantity of provisions from the storeroom aft and a quantity of saloon stores, china, cutlery, and so forth had been stolen, a storeroom door in the engine room had been forced open and stores and tools stolen from the engine room, and effects of the master had been stolen from his cabin. The evidence for the *Nérée* was that nothing was removed from the *Kenora* except a quantity of clothing and one cigarette case, which were found washing about the deck forward; that these things were packed in five bags and taken on board the *Nérée* when the mate and his three men left the *Kenora* on the night of the 3rd; and that these five bags with their contents were returned to the master of the *Kenora* in Swansea. I cannot accept this evidence as a true account of the whole matter. It is quite irreconcilable with the fact that in the bags

which were returned were a number of articles from the cabins and saloon aft, including such things as knives, forks, spoons and crockery. It is said there is no evidence that the thefts were not committed before the *Nérée* went to the *Kenora*. But had the doors been already forced by the time the mate and his three men boarded the *Kenora* that fact could easily have been proved. The story told by the mate, in view of the contents of the five bags, is obviously false. No one of the three men was called. They and the mate were on board the *Kenora* all the way up to Swansea; at Swansea the *Nérée* was lying alongside the *Kenora*, and for two days no one else was permitted to come on board. That the five bags contained only a small part of what was taken from the ship is certain. It is significant that they were not at once replaced on board the *Kenora* or delivered to the receiver of wrecks, and that they were not mentioned to the master of the *Kenora* until he had made complaints about the pillage. The master of the *Nérée* denies that he knew what the bags contained, but the other evidence from the *Nérée* is that they were emptied and refilled on board the *Nérée*.

I am forced to the conclusion that there was larceny on an extensive scale by those on board the *Nérée*, and that the master, if not a party to it, was privy to it. There can be only one consequence—the master and crew forfeit their right to any award. In view of their personal exertions I should have awarded them 1000*l*. I reduce the *Nérée's* award to 2400*l*.

It was contended for the defendants that the owners of the *Nérée* must suffer the same penalty. For the owners of the *Nérée* it is said that larceny or criminal misconduct of the master and crew does not affect the owners. No case in this Court directly in point was cited. And, so far as I know, there is no British decision directly in point except *The Scindia* (1), which was in the Vice-Consular Court of Cape Town. For the defendants it is contended that there is no difference between criminal misconduct and any other

(1) 2 M. L. C. (O. S.) 232.

1920

THE KENORA.

Hill J.

misconduct in its effect upon a salvage award. I was referred to Kennedy's Civil Salvage, 2nd ed., at p. 144, and the cases there cited. I have looked at those cases. In most of them the persons claiming salvage were the very persons against whom misconduct was found. In the rest, the misconduct of the master or crew which affected the owners was misconduct in the manner of rendering the service or negligence giving rise to the risk of the salved vessel. *The Duc d'Aumale* (1), which was also cited, was of the last-mentioned kind. The reason of the decision as to the crew was that it was undesirable on grounds of public policy to encourage a crew to hope to recover salvage in respect of services to be rendered to a vessel damaged through the contributory negligence of their master. I do not doubt that the owners' right to salvage does not depend upon agency, and must, like all other claims to salvage, be considered in the light of public policy. But I see no reason to alter the views I expressed in my judgment in *The Clan Sutherland* (2); and, in the absence of English authority, I see very good reason for being guided by the judgment of Story J. I find that the owners of the *Nérée* did not participate in the larceny; were not privy to it, either before or after the fact; and did not by any negligence enable it to be done or to be undetected. I do not, therefore, either forfeit or diminish their award—2400*l.*

Solicitors for the *Assistance* and *Margaret Ham*: *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for the *Nérée* and *City of Sparta*: *William A. Crump & Son.*

Solicitors for the *Algerian Prince*: *Downing, Handcock & Co., for Middleton & Co., Sunderland.*

Solicitors for Richard Powell: *Thomas Cooper & Co., for Talfourd Strick, Swansea.*

Solicitors for the defendants: *Lawrence Jones & Co.*

(1) [1904] P. 60. (2) [1918] P. 332, 341.

E. C. M. T.

ADMIRALTY.

1920
Nov. 12, 13, 15, 16, 17; *Dec.* 1.

THE LOMONOSOFF.

Admiralty—Salvage—Rescue from Bolsheviks—Status of Bolsheviks—Comity of Nations—Voluntariness.

In February, 1920, the plaintiffs, two British and two Belgian officers and twenty-three Belgian soldiers, were in Murmansk on their way to take service with the Government of Northern Russia, when a Bolshevik rising took place and the town and port of Murmansk fell into the hands of the Bolsheviks. The plaintiffs, who would have been imprisoned and probably shot if they had remained in Murmansk, could have escaped by sleigh to the Norwegian frontier, but they decided to escape by sea, and, if they could, to take with them one of the vessels lying in the harbour. Accordingly they boarded the defendants' steamship *L.* which was still flying the mercantile flag of the Government of Northern Russia. Most of the vessels lying in the port had already hoisted the red flag in token of submission and many of them had been boarded by armed Bolsheviks. A number of the crew of the *L.* were on shore and there was insufficient steam in the boilers for her to proceed to sea.

The plaintiffs, who brought two machine guns with them, cast off sufficient ropes to let the *L.* fall away from the quay, helped to raise steam, and returned the heavy fire from the quay and from other ships which had surrendered. In the course of the fighting three of the plaintiffs were wounded. The *L.* was thus enabled to effect her escape from Murmansk. The plaintiffs, with some assistance from the officers and crew of the *L.*, then navigated her as far as Tromso, where the plaintiffs handed her over to the representatives of the owners:—

Held, that although in saving the *L.* the plaintiffs were also effecting their own escape, they had other means of escape and were under no duty to save the *L.*, and, therefore, were volunteers; that the Bolsheviks were not acting with the authority of a politically organized and recognized society and that the danger to the *L.* was not that of passing from the control of one form of government into the control of another, but was analogous to a rescue from pirates or mutineers; that accordingly there was nothing in the comity of nations which compelled the Court to treat the rescue as a rescue from lawful authority and that the plaintiffs were entitled to salvage remuneration.

ACTION OF SALVAGE.

The plaintiffs, Allan James Marshall and others, claimed salvage remuneration for services rendered to the defendants' steamship *Lomonosoff* in February, 1920.

The plaintiffs alleged that by their services (the nature of which are summarised in the headnote and set out in detail

1920

THE LOMONOSOFF

in the judgment) the *Lomonosoff* was saved from certain total loss at the hands of the Bolsheviks. The defendants denied that the plaintiffs rendered any salvage service, and in the alternative pleaded that if the plaintiffs rendered any services deserving of salvage award they were disentitled to any award by reason of misconduct: (*a*) in seizing the ship's papers; (*b*) in threatening and endeavouring to supersede the chief officer; (*c*) in preventing the chief officer and other members of the crew from communicating with the shore; (*d*) in breaking into the storerooms and taking provisions and stores; and (*e*) in taking a number of paper roubles belonging to the master.

Bateson K.C. and *Stranger* for the plaintiffs. Although in rescuing the *Lomonosoff* from the Bolsheviks the plaintiffs at the same time effected their own escape, they could have got away without any risk to their lives by sleigh to the Norwegian frontier. Instead of adopting the safer route they elected at the risk of their lives to save the *Lomonosoff* as well. They are therefore volunteers and entitled to be remunerated on a handsome scale. It is not necessary that the risk from which the defendants' property is saved should be a marine risk, it may be from capture by pirates: *Cargo ex Ulysses*. (1) The nearest analogous case to this is *The Two Friends* (2), where an American ship taken by the French was recaptured by the crew assisted by British subjects on board the ship who were working their passage home and were not classed as members of the crew. The British subjects claimed, and were awarded, substantial sums for salvage. If the Bolsheviks had seized the *Lomonosoff* her owners would have been deprived of her use for an indefinite period and probably would never have got her back at all: cf. *The Svanfos*. (3)

A. T. Miller K.C. and *S. L. Porter* for the defendants. The plaintiffs' sole object was to save themselves; they incurred no additional risk, and they came on board

(1) (1888) 13 P. D. 205. (2) (1799) 1 C. Rob. 271.
(3) [1919] P. 189.

involuntarily. What they did, therefore, does not entitle them to salvage. Where there is a common danger it is the duty of every one on board a vessel to give all the assistance he can: *The Branston* (1); *The Vrede.* (2) "Salvage is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea": see per Brett L.J. in *The Cargo ex Schiller* (3); the plaintiffs were not volunteers, and the vessel was not rescued from a marine risk. All that would have happened to the vessel probably is that the Bolsheviks would have requisitioned her, and this would equally have happened in time of war under a de jure government. Salvage cannot be awarded for taking away a vessel from government authority even if that government is unrecognized—i.e., a de facto government: cf. *The Annette* (4), as to the position of the government of Northern Russia. [Reference was also made to *The Neptune* (5) and *The Salacia.* (6)] Assuming there were elements of salvage, the plaintiffs are disentitled to an award, because they seized the vessel and took her by force of arms out of the control of her master.

Bateson K.C. replied.

Cur. adv. vult.

Dec. 1. HILL J. read the following judgment. The plaintiffs claim salvage for the rescue of the defendants' steamship *Lomonosoff* from Murmansk on February 21, 1920, at a time when a Bolshevik rising in Murmansk overthrew the Government of Northern Russia in that port.

The plaintiffs are Mr. Marshall and Mr. Wood, who had been formerly in the British Air Force, M. Tilmant and M. Viseur, who were Belgian officers, and twenty-three Belgian soldiers. All these persons found themselves at Murmansk in February, 1920, on their way to take service with the Government of Northern Russia. The *Lomonosoff*, a twin screw steamship of 915 tons gross, belonging to the

(1) (1826) 2 Hagg. Adm. 3*n*.
(2) (1861) Lush. 322.
(3) (1877) 2 P. D. 145, 149.
(4) [1919] P. 105.
(5) (1824) 1 Hagg. Adm. 227, 236.
(6) (1829) 2 Hagg. Adm. 262.

1920

THE LOMONOSOFF

Hill J.

defendants, the Archangel-Murmansk Steamship Company, with a Russian captain and crew, and flying the mercantile flag of the Government of Northern Russia, was in February, 1920, lying at Murmansk. She had brought thither Red Cross stores and some troops. She was under charterparty for a voyage from Narvik to Newcastle. Her master was anxious to leave Murmansk, but permission to sail had not been granted by the authorities before February 21.

On February 18, in Archangel, the Bolsheviks defeated the forces of the Government of Northern Russia and became masters of Archangel. Their aim was to substitute a Bolshevik form of government in Northern Russia. On February 21 a similar rising in Murmansk was equally successful. The town of Murmansk is a mile or two from the port. At about 4 P.M., or rather later, armed Bolsheviks from the town began to come down to the port. In the result the port also fell into their hands, nearly all the ships lying in the port hoisted the red flag in token of submission, and many of them were boarded by armed Bolsheviks. Two vessels only escaped, the *Lomonosoff* and a tug carrying Captain Polivanoff, the senior transport officer of the Government of Northern Russia at Murmansk. Other supporters of the Government of Northern Russia escaped by sleigh; among them were some who left before the 21st, also Colonel Delatosky, Commandant of Murmansk, who left on the afternoon of the 21st and reached Pechinge in safety, though it was stated that he was subsequently killed. Pechinge is near the Norwegian frontier.

The plaintiffs' case is that they were the persons who effected the escape of the *Lomonosoff* and they say that that entitles them to salvage. The defendants' case is that the *Lomonosoff* would have escaped by the efforts of her own master and crew and that the plaintiffs were rather a hindrance than a help. They further contend that the plaintiffs did not act as volunteers, but to save their own lives. Also, they allege misconduct subsequent to the departure from Murmansk in the following respects: (*a*) robbery from the ship of stores, provisions and money; (*b*) a refusal to recognize

the lawful authority of the mate after the master, who was wounded, had been landed at Vardo; and (*c*) delay in handing over the ship to her owners. It was further argued, though not pleaded, that the ship was saved from no danger and that the rescue was of no benefit to the owners.

The plaintiffs' story was told in evidence at great length. I need not go through it at like length. The *Lomonosoff* was lying moored to the quay in a space between two quays where many other ships were lying. She had a short supply of coal and only two fires in one boiler and none in the other boiler. At 4 P.M. on the 21st she was not in a condition to proceed to sea until adequate steam had been raised. Some two or three hours later she did get away under her own steam. During the interval she had been boarded by the plaintiffs, who brought two machine guns with them; sufficient ropes had been cast off to let her fall off from the quay; steam had been got up; heavy fire from the quays and from other ships had been received and returned; and the last rope had been cut through or broken by engine movement. Three of the Belgian soldiers had been wounded, and the master of the *Lomonosoff* had also been wounded.

Was the escape of the *Lomonosoff* from Murmansk due to the plaintiffs? I have no doubt that it was. The master and crew would never have got the ship away. That the master was anxious to sail before the 21st is immaterial. He had not been permitted to sail and the ship was not ready to sail. On his own showing no steps towards getting the ship ready had been taken till the afternoon of the 21st. Of the crew the total complement was thirty-four. At the critical time, after 4 P.M., there were only seventeen on board, including three women. The rest were either already on shore or left the ship on the first sign of trouble. Of the remaining members of the crew, other than the officers and the one fireman on board, very little was seen until after the ship was away when they were found in the forecastle. Assuming that the officers and engineers were ready and willing and anxious to get away, it is certain that but for

1920

THE LOMONOSOFF

Hill J.

the armed resistance of the plaintiffs the ship must have been taken by the Bolsheviks long before steam could have been got up. The suggestion that the moorings could have been cast off, and that the *Lomonosoff* could have slipped away without being noticed and prevented, is absurd. But I am not prepared to find that the officers and engineers, or even the master when the pinch came, were zealous to get away. I do not know that they are to be blamed for that. They may well have been anxious to save their own lives and unwilling to engage in what was a very hazardous enterprise. Whether any of them were of Bolshevik sympathies or not I need not determine. The engineers were certainly showing no activity; a single fireman was at the fires; no help was given him by any of the three engineers, and no attempt made to get the third fire away. Some one on board, probably one of the crew, hauled down the *Lomonosoff's* flag and attempted to hoist a red flag. The second officer was caught shouting to the Bolsheviks that the *Lomonosoff* would surrender; he says it was a ruse to make the firing cease and poses as a misunderstood man. It may be so, though it does not seem necessary to the ruse that he should also be giving advice as to the best means of boarding the *Lomonosoff*. The master was undecided and shut himself in his cabin, where unfortunately he was wounded. The chief officer helped with the ropes; but neither he nor the second officer went to the bridge till the ship was well on her way. It was the activities of the plaintiffs which effected the escape of the ship. They fought the attackers, they loosed the ropes, they helped to stoke, and they compelled the engineers to bestir themselves.

I find that the plaintiffs were the cause of the escape of the *Lomonosoff* from Murmansk.

Were the plaintiffs volunteers? It is true that in saving the *Lomonosoff* they were effecting also their own escape. If they had remained in Murmansk they would certainly have been imprisoned and most probably shot. But they had other means of escape. They could have done what others did—get away by sleigh to the Norwegian frontier.

They chose not to do that, because, at the instigation or at least with the approval of Captain Polivanoff, they determined to try and take a ship with them and selected the *Lomonosoff* as giving them the best chance. Reliance was placed by the defendants on a passage at p. 2 of Kennedy's Civil Salvage, 2nd ed., but it must be read with other passages, especially p. 28, where the learned author says: "It is to be observed that, except in the peculiar case of the passengers on board a vessel in distress, the requirement of voluntariness in the salvor is satisfied by the absence of any contractual or official obligation." It not infrequently happens that a salvor in saving property is also saving himself: see, e.g., *Le Jonet* (1); and where in a case like the present the salvor has two means of saving himself and elects one which also saves maritime property I have no doubt that qua that property he is a volunteer. There is of course no pretence for saying that the plaintiffs were under any duty to save the *Lomonosoff*. I hold that the plaintiffs were volunteers.

As to the charges of misconduct, which it is for the defendants to prove, I find them to be without foundation. As to stores and provisions, the plaintiffs and the crew had to be fed, and later on a large number of refugees were taken on board at Honningvaug. That provisions should be consumed, and some stores broken or lost, is not surprising. As to the master's roubles, there is no evidence at all against any of the plaintiffs. Some notes were found lying about and were returned to the master at Vardo, and another roll found after he was landed was returned to him later on at Newcastle. He himself is not very certain how many paper roubles he had on him. The charge completely breaks down. As to the charge of superseding the mate, there was in my opinion no misconduct. At one time at least the mate professed his unwillingness to take charge. And, apart from that, if the plaintiffs bona fide believed that to allow the ship to be in charge of her officers would be to run the risk of the officers taking the ship back to Murmansk,

(1) (1872) L. R. 3 A. & E. 556.

1920

THE LOMONOSOFF

Hill J.

they were justified in running no risks. They did suspect the officers, a suspicion which was shared by Captain Polivanoff. According to the evidence, another ship belonging to the owners of the *Lomonosoff*, which came to Vardo while the master of the *Lomonosoff* was there, was compelled by her crew to proceed to Murmansk. It may be that the plaintiffs wrongly supposed that in taking the *Lomonosoff* they had made a prize of war. But, whatever their idea may have been, I find that they bona fide distrusted the mate, the second officer and the crew, and therefore were justified in doing what they did in trusting the navigation to another Russian naval officer who was on board and who escaped on the *Lomonosoff*. At Tromso they handed over the ship to the representatives of the owners. The charge of misconduct therefore breaks down. I have now dealt with the defences specifically pleaded.

There was a general denial of salvage, and it was argued that the *Lomonosoff* was not in any such kind of danger as can give a right to salvage and was not saved from any such danger. To contend that the ship was not in danger is somewhat strange in view of the pleaded defence that the master and crew were always anxious to get the ship away, and that, but for the plaintiffs, she would probably have got away unobserved. It is strange also in the light of the master's letter of February 29, 1920, in which he says: "I am glad things have turned out so fortunately." Until the point was made in argument I can find no suggestion that the *Lomonosoff* was not removed from a position of danger. The master in evidence said that if the ship had remained at Murmansk there was a danger that she might be at the disposal of the Bolsheviks, and that Bolsheviks use ships as they wish and do not pay the owners for them. The owners had had a previous experience in 1918 when their fleet passed for a time under Bolshevik rule, and was employed in trading on the coast without benefit to the owners. Since February, 1920, they have been deprived of the use of several ships which, unlike the *Lomonosoff*, did not escape from North Russian ports. The plaintiffs say: We saved the ship

from being taken out of the possession and use of the owners for an indefinite time; and possibly we saved the ship from being permanently lost to her owners. I agree that that is what the plaintiffs did. The defendants contend that a danger of that sort is not one which can give rise to civil salvage; they say the danger to a Russian ship was of passing from the control of one form of government into the control of another form of government, and they contend that salvage cannot be given for a rescue from such control and its consequences, any more than it could be given for taking a ship out of the arrest of a foreign government or Court established at the place where the ship was. It is obvious that this Court, respecting the comity of nations, would never treat as a meritorious service the act of persons who in defiance of the laws of an established government recognized by and in friendship with this country, took a ship out of the lawful control of such a government. But at Murmansk on February 21 there was no government recognized by this country and indeed no established government at all. There was for the moment a state of anarchy, during which armed men were taking possession of all the ships they could get at. It is true that, so far as I can judge, they were not strictly pirates in the sense that they were persons who plundered indiscriminately for their own private ends. But, on the other hand, they were not acting with the authority of a politically organized society, and certainly not with the authority of any politically organized society which at the time was recognized by this country. There is nothing, therefore, in the comity of nations which compels this Court to treat the rescue as a rescue from lawful authority. I hold that the danger was one to which this Court can have regard and a rescue from which this Court can reward. It is not the same as, but it is analogous to, a rescue from pirates or mutineers, which this Court has always recognized as the subject of salvage.

In considering the amount of the reward, the extent of the danger is of course important. Was the ship saved from permanent or from temporary loss to the owners? It

1920

THE LOMONOSOFF

Hill J.

is a matter of conjecture, but in that respect the case is not peculiar ; in most cases of rescue from sea perils it is a matter of conjecture what would have happened to the ship but for the services. It is at any rate certain that the danger extended to dispossession for an indefinite time. On that basis I propose to reward the services.

The services were rendered with great courage and skill and at great personal risk. The ship has been appraised and the appraisement is 48,500*l.*, subject to an agreed figure—namely, the damage done by the events at Murmansk of 300*l.* The value therefore to which I have to have regard is 48,200*l.* I award to each of the four officers, Mr. Marshall, Mr. Wood, M. Tilmant and M. Viseur, 800*l.* ; that will be 3200*l.* I award to the twenty-three men 2900*l.*, giving a double share to the sergeant, to the two interpreters, and to the three men who were wounded. That will make a total of 6100*l.*

Solicitors for the plaintiffs : *Stokes & Stokes, for Criddle & Ord, Newcastle-on-Tyne.*

Solicitors for the defendants : *Parker, Garrett & Co.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

1920
July 29;
Oct. 14.
C. A.
Dec. 6.

SCOTT *v.* SCOTT.

Divorce—Practice—Permanent Maintenance—Agreement by Wife to accept Sum which had been by Consent allowed pendente lite—Leave to present Petition out of Time—Application to Judge—Jurisdiction of Court to increase Amount—Construction of Agreement—Jurisdiction of Registrar——"On any decree for dissolution or nullity of marriage"—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-ss.* 1, 2.

By the Matrimonial Causes Act, 1907, s. 1, sub-s. 1, the Court may "on any decree for dissolution or nullity of marriage" order the husband to secure to the wife such gross or annual sum of money as it may deem reasonable, or (sub-s. 2) order him to pay during their joint lives such monthly or weekly sum for her maintenance as it may think fit: provided that (*a*) if the husband becomes unable to pay the Court may modify or discharge the order, or (*b*) if satisfied that the means of the husband have increased may increase the amount payable under the order.

In a wife's suit for divorce alimony pendente lite at 500*l.* a year was ordered in pursuance of an agreement by the wife to accept permanent maintenance at the same rate. A decree absolute was made in July, 1913. No order for permanent maintenance was ever made, but the 500*l.* was paid until June, 1919, when the wife, hearing that her husband's income had very largely increased, took out a summons before the Registrar for leave to file a petition for permanent maintenance. The Registrar granted leave and the petition was filed in November, 1919. The husband took several steps in the proceedings and filed his answer. At the hearing of the petition he took the objection that the Registrar had no power to give such a leave. This summons was then taken out before the judge for leave to file the petition:—

Held, by Sir Henry Duke P., that in the absence of any express provision in the agreement that the wife would not apply for an increase, the Court had the same power to grant an increase under the Matrimonial Causes Act, 1907, s. 1, sub-s. 2 (*b*), as it would have had if an order for permanent maintenance had been made; that under the special circumstances leave to file a petition out of time ought to be given; and that the husband's objection to the Registrar's jurisdiction was waived by the steps he had taken after the petition was filed.

Held, by the Court of Appeal (reversing the decision of Sir Henry Duke P.), that the words "on any decree for dissolution of marriage" in sub-s. 1 of the Act did not confer on the judge an unfettered discretion as to the time within which he would allow a petition to be filed, but that they meant that the petition must be filed "at" or "within a reasonable time after" the decree, having regard to all the circumstances of the case.

Held, therefore, that seven years after the decree was pronounced

C. A. 1920

SCOTT v. SCOTT.

was not a reasonable time within which to apply for leave to file the petition, and that leave must accordingly be refused.

Dictum of Jessel M.R. in *Robertson* v. *Robertson* (1883) 8 P. D. 94, 96 approved and applied.

THE applicant was married to the respondent, a domiciled Englishman, in 1891. In 1895 the wife filed a petition for judicial separation, and alimony pendente lite was ordered to be paid by the husband at the rate of 96*l.* per annum. He went to reside in the United States, and made no payment under this order. A decree of judicial separation, at the wife's instance, was made on August 5, 1902. In that year the husband temporarily came to England, and the wife obtained an order for permanent alimony at the rate of 160*l.* per annum, under which payments were duly made from 1903 to 1912. In July, 1912, the wife took proceedings for dissolution of her marriage. The husband appeared in the suit, but filed no answer. In October, 1912, the wife filed a petition for alimony pendente lite and alleged that her husband had an income of two or three thousand pounds a year. Communications then took place between the solicitors of the parties. On October 14, 1912, the husband's solicitors wrote to the wife's solicitors: "Confirming our interview with you, our client is willing to pay alimony at the rate of 500*l.* per annum, the understanding being that your client will agree to accept permanent maintenance at the same rate. Will you kindly confirm this and let us have form of order for approval?" On October 15, 1912, the wife's solicitors replied: "We are in receipt of your letter of yesterday's date, and our client accepts the offer therein contained. We will let you have draft order for approval in due course." In pursuance of this understanding so arrived at, the solicitors attended before a Registrar on October 18, and the Registrar made an order by consent for alimony pendente lite at the rate of 500*l.* per annum as from the date of service of the citation. Then, for some reason which did not appear, the parties agreed that the alimony should be paid at the old rate until after the decree.

A decree nisi for dissolution of the marriage was made

on January 17, 1913, and on July 28, 1913, it was made absolute.

From November, 1912, to July, 1913, the husband made payments to the wife at the rate of 160*l.* per annum. After July, 1913, he made payments at the rate of 500*l.* per annum.

In June, 1919, the wife, through her solicitors, requested an increase of the provision for her maintenance to 1250*l.* a year, partly because, as she stated in her affidavit, she had discovered that her husband's position was much better than in 1912 as she knew it, and partly because an income of 500*l.* was of much less value in 1919 than in 1912. The husband's solicitors refused this, but offered an additional 50*l.* per quarter. Consequent upon this correspondence the wife applied before a Registrar for leave to file a petition for permanent maintenance. Upon a hearing which was attended by the solicitors for the parties on November 14, 1919, leave to file a petition was given, and a petition was filed on November 17, 1919.

The applicant's affidavit in support of her petition stated the respondent's income from his business at 10,000*l.* a year, and his "fortune" at 300,000*l.* In January, February, March and April of this year, the respondent obtained five successive extensions of time for his answer to the petition of the applicant. In May he delivered his answer, in which he left the amount of his business income at large, but stated that his capital in his business was from seventy to eighty thousand pounds. An appointment for the hearing of the petition was given, and at the hearing the respondent's solicitors attended and disputed the jurisdiction of the Registrar to make any order. Thereupon the applicant issued a summons returnable before a judge for leave to file a petition; this summons was adjourned by the President into Court and now came on for hearing.

Sir Ellis Hume-Williams K.C. and *Grazebrook* for the petitioner. There has never been any order for permanent maintenance. 500*l.* a year has been paid under the agreement which is found in the correspondence between the

1920

SCOTT v. SCOTT.

solicitors, which the respondent contends amounted to a binding agreement that the wife would accept 500*l.* a year during her life and never apply for more than that sum. In the first place there was no binding agreement at all for there was no consideration for it. If it was binding there was nothing in it about during the life of the wife. *Maidlow* v. *Maidlow* (1) which was relied on by the respondent in Chambers was a case where the Court had made an order for payment of maintenance during the wife's life, which could only be made by consent, and the Court refused to vary it. That is quite a different case. Here the fact that the wife was receiving the 500*l.* and had no knowledge of her husband's increased wealth, were good reasons for the wife's delay in applying. In any case the so-called agreement cannot bind the parties further than an order made by the Court under s. 1, sub-s. 2, of the Matrimonial Causes Act, 1907 (2); but

(1) [1914] P. 245.

(2) Matrimonial Causes Act, 1907, s. 1, sub-s. 1: "The Court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the Court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed."

Sub-s. 2: "In any such case the Court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the Court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding sub-section:

"Provided that—

"(*a*) If the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the Court may think fit; and

"(*b*) Where the Court has made any such order as is mentioned in this sub-section and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order."

there is no doubt that under the circumstances the Court could vary such an order by virtue of s. 1, sub-s. 2 (*a*).

[*Bayford K.C.* referred to *Robertson* v. *Robertson*. (1)]

There is no time fixed for presenting a petition for maintenance under the Matrimonial Causes Act, 1907. Rule 95 of the Divorce Rules does not apply to that Act; but in any case it gives the Court a discretion. As to the jurisdiction of the Registrar to make the order, the respondent has waived that objection by his applications for time to answer the petition.

[They also referred to *Nicolas* v. *Nicolas* (2) and *Fyffe* v. *Fyffe*. (3)]

Bayford K.C. and *Bucknill* for the respondent. As to waiver the Registrar's order was a nullity, and, therefore, applications by the respondent as to time cannot be a waiver of his right to oppose this application.

The time at which an application for permanent maintenance ought to be made has long passed. The Act of 1907 fixes the time as on the decree. That cannot possibly mean seven years after it. The agreement was evidently intended to settle the whole question and was binding on the parties. If the wife had applied in proper time the Registrar would no doubt have drawn up an order by consent for payment of the 500*l.* during the joint lives of husband and wife, and the wife would have been precluded from asking for an increase. If there is any discretion left in the Court, the long delay of the wife is a sufficient reason for not exercising it.

Cur. adv. vult.

Oct. 14. Sir HENRY DUKE P. [after stating the facts as above set out continued:] The substantial importance of the questions involved in the application, and the necessity of considering with care certain technical considerations which arise in view of the decision of the Court of Appeal in *Nicolas* v. *Nicolas* (2), and the decision of this Court in *Fyffe* v. *Fyffe* (3),

(1) 8 P. D. 94. (2) [1919] W. N. 267.
(3) [1920] P. 310.

1920

SCOTT v. SCOTT.

The President.

led me to adjourn the summons into Court, and to direct the parties to exchange written statements of the points they intended to argue.

For the applicant it was submitted before me that her application ought to be regarded as an application made in due time under the Matrimonial Causes Act, 1907, inasmuch as the applicant had abstained from applying at an earlier date in compliance with the arrangement made in 1912. Assuming the transaction of 1912 to have amounted to an agreement and the agreement to be now in force, neither of which conditions was admitted, Sir Ellis Hume-Williams contended that the alleged agreement could have no larger effect than a consent order made under the Matrimonial Causes Act, 1907, s. 1, sub-s. 2, and that if such a consent order were in existence, the Court would by the terms of the sub-section be competent to vary it and to increase the agreed amount of the applicant's maintenance.

For the respondent, Mr. Bayford argued that the time at which an application for maintenance could be made under the Matrimonial Causes Act, 1907, had long elapsed; that the correspondence showed an agreement binding upon both parties under which the husband was bound to pay to the wife 500*l.* a year during their joint lives, and the wife was precluded from maintaining any demand for a larger sum. He also submitted that there was no jurisdiction to make the order made by the Registrar for leave to file a petition, and in the alternative that if in the circumstances the terms of the statute left any discretion to the Court, the discretion ought to be exercised against the applicant.

Apart from special circumstances it would, in my opinion, be impossible to say that an application made seven years after a decree of dissolution of marriage is an application made on the making of the decree. Sir George Jessel M.R. dealt in *Robertson* v. *Robertson* (1) with the construction of words practically identical with those of the Act of 1907, and expressed the view that the limitation of time stated in the word "on" must be such that "if not confined to the

(1) 8 P. D. 94, 96.

time of making the decree it must mean shortly after." After dissolution of marriage when years have elapsed without either resort to the Court, or demand for, or concession of a provision, the dissolved marital relationship cannot be made, at the will of the released wife, the ground of a claim for permanent support from the quondam husband. What interval of time will effectually prevent a claim is not determined by the statute, and in the view I take of this case it is not necessary if it were desirable to lay down a hard-and-fast rule on this occasion. This case is not one in which the lapse of years without payment or demand compels a summary refusal of the claim of the applicant.

It is necessary to determine in the first place the true effect of the transaction between the parties in the year 1912. Did the applicant then agree either that she would not ask from the Court any order for periodical payments by way of maintenance, or that she would under no circumstances lay claim to increased maintenance? If she so agreed she ought not to profit by this application, at any rate in the sense of being held entitled to a larger annuity than 500*l.* per annum. The subject-matter of the negotiations in 1912 and the terms of the letter seem to me to make the intention of the parties fairly clear. The respondent's letter of October 14, 1912, was an offer, and the applicant's letter of October 15, was in form an acceptance. The parties intended an agreement, and I think there is no such ambiguity in the language they used as to prevent their intention from taking effect. They had in mind and were agreeing with regard to the power of the Court to order payment of alimony pendente lite, and the further power of the Court under the Matrimonial Causes Act, 1907, s. 1, sub-s. 2, on any decree for dissolution of marriage, to make an order on the husband for payments to the wife during their joint lives for her maintenance. From the terms of the letters as a whole I think the solicitors intended that the order for alimony pendente lite should be followed at the proper time by an order for permanent maintenance. I suspect that when the controversy arose in 1919 it was not remembered on either side

1920

SCOTT v. SCOTT.

The President.

that the order for maintenance had not been made. However that may be, I am satisfied that, on the making of the decree absolute, the wife was entitled to apply, and would have successfully applied, for such an order. Some argument was founded before me on the reduction which was ultimately made in the rate of payment pendente lite. Sir Ellis Hume-Williams suggested that this departure from the October terms might be regarded as a repudiation of the proposed agreement. I think it was merely an agreed variation, and that the agreement stood with that change.

What is vital to the applicant's claim is to see whether she in 1912 bound herself not to seek any larger payment for permanent maintenance than a payment at the rate of 500*l.* a year. I think she did not. In my opinion she agreed in effect simply that the rate of payment to be fixed by the Court at that time in the exercise of its powers in that behalf should be 500*l.* a year. The provision was that obtainable and enforceable under sub-s. 2. If it had been the intention of the parties to exclude the power of the Court under sub-s. 2 (*b*) of this Act to increase the payments for maintenance when the means of the divorced husband are found to have increased, they could simply have stated their agreement to that effect, and the respondent ought to have seen that it was so stated.

I hold, therefore, that the wife's provision from the husband is subject to review by the Court, and that the applicant has not debarred herself from resorting to the Court for an increased scale of maintenance.

Whether the summons for leave to file a petition, which was issued in November, 1919, ought to have been heard before a judge or before a Registrar; whether prima facie the application was made too late, and whether the Registrar ought to have granted the leave which he in fact granted, are mere academic questions. The respondent took no objection at the time, and did not appeal. On five successive occasions he obtained extensions of time for answer. The subject-matter was, and the parties were, within the jurisdiction of the Court, and the conduct of the respondent operated to waive any objection he might have taken in respect of the

time and form of the application. The agreement of the parties gave the applicant a right to be heard. Before the Judicature Act the respondent could have been restrained in a Court of equity from making any answer contrary to his agreement. If any question had been raised in the first instance before the Registrar, he would no doubt have referred the summons to the judge. Such an order ought now to be made as the justice of the case requires.

I therefore allow the present application and direct that the proceedings already taken under the Registrar's order of November 14, 1919, shall be deemed to have been taken under this order.

There will be the usual inquiry in the Registry as to the means of the respondent, and the substantial question whether he ought to make some increased payment to the applicant, and what addition, if any, ought to be made, will be dealt with at the hearing of the petition.

The respondent must pay the costs of this application.

J. R. B.

The husband appealed. The appeal was heard on December 6, 1920.

Bayford K.C. and *Bucknill* for the appellant. The question on this appeal arises on the construction of the word "on" in s. 1, sub-s. 1, of the Matrimonial Causes Act, 1907. That sub-section empowers the Court "on any decree for dissolution of marriage" to order the husband to secure to the wife such gross sum or such annual sum of money for any term not exceeding her life as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it may deem reasonable. Sub-s. 2 empowers the Court in any such case to make an order on the husband for payment during their joint lives of such monthly or weekly sum for her maintenance and support as it thinks reasonable and to make any such order either in addition to or in substitution for an order under the last preceding sub-section. The sub-section contains two provisos: proviso (*a*) which

C. A. 1920

SCOTT v. SCOTT.

enables the Court, in the event of the husband becoming unable to make the payment, to discharge or modify the order, and proviso (*b*) which enables the Court, where the husband's means have increased, to increase the amount payable under the order. Sub-s. 1 contemplates the case where property or a fund is vested in trustees so as to produce an annual income. If an order is made under that sub-section the Court has no power to vary it. Sub-s. 2 contemplates the case where no fund is vested in trustees but an order is made for payment by the husband of a certain sum from time to time. The Act repeals s. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and s. 1 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), but by s. 1 re-enacts them in practically the same terms with the addition of proviso (*b*) to sub-s. 2. No rules have been made under the Act of 1907 but in practice the provisions of r. 95 of the Divorce Rules have been adopted which require that applications for maintenance shall be filed not later (except by leave of the judge) than one month after decree absolute: Rayden on Divorce, p. 233, § 17. It is submitted that an application for an order either under sub-s. 1 or sub-s. 2 must be made not later than one month after the decree absolute, and that under no conceivable view can an order made seven years after the decree has been pronounced be said to be made "on" the decree.

In the present case no order for maintenance was in fact ever made. The wife was content to rely on the agreement by the husband to pay her 500*l.* a year, the effect of which was to preclude him from applying to the Court under s. 1, sub-s. 1 (*a*), to have the amount reduced. If the wife had obtained an order under sub-s. 2 the payments under it would have been limited to their joint lives, and the wife would have been precluded by consent from asking for an increase under proviso (*b*). In *Robertson* v. *Robertson* (1) Jessel M.R. said that the word "on" in s. 1, sub-s. 1, "if not confined to the time of making the decree, must mean shortly after."

It is submitted therefore that the word "on" in s. 1,

(1) 8 P. D. 94, 96.

sub-s. 1, is there used in the ordinary acceptation of the term as meaning "at" or "a reasonable time after" and does not extend to an application made seven years after the decree. The present application is in effect an application under s. 1, sub-s. 2 (*b*), for an increase of maintenance, and that cannot be made unless there is an existing order for maintenance.

Sir Ellis Hume-Williams K.C. and *Grazebrook* for the petitioner. In this case both parties thought that there was an order for maintenance. It is now found that there is no such order and the wife asks the Court in the exercise of its discretion to allow her now to file a petition under sub-s. 2 of s. 1 of the Act of 1907, which she could have filed on the decree absolute being made. It is submitted that the correspondence did not amount to an agreement by her never to ask for more than 500*l.* a year. The Act of 1907 fixes no limit of time within which to present a petition. In practice r. 95 has been adopted and acted upon. That rule gives the Court a discretion as to the time within which it will allow a petition to be presented. In *Robertson* v. *Robertson* (1) Jessel M.R. assumed that he had a discretion which he could exercise. If leave to file a petition is granted the petitioner may or may not succeed on her petition.

The husband is estopped by conduct from taking the point that the Registrar had no jurisdiction to make the order. He appeared before him on the wife's petition and obtained five adjournments for time to answer it. He must therefore be taken to have waived any objection to jurisdiction. The practice had grown up of making these applications to the Registrar, but in the recent case of *Fyffe* v. *Fyffe* (2) it was held that they must be made to the judge only.

The question here is whether the word "on" in s. 1, sub-s. 1, means "contemporaneously with" or "directly after" the decree, and it is submitted that that is not its meaning. None of the successive presidents of the Divorce Division has taken that view. All that the statement by Jessel M.R. in *Robertson* v. *Robertson* (1) amounts to is this, that he thought that

(1) 8 P. D. 94, 96.

(2) [1920] P. 310.

C. A. 1920

SCOTT v. SCOTT.

if he had a discretion he would have considered that "on" meant not more than a year. That at least shows that he thought that the word "on" was capable of a wider interpretation than "then and there." The word "on" is an elastic expression and has been so construed by the Court: *Bradley* v. *Bradley*. (1) It is submitted that it means "after" and that there is no limit of time imposed by it. The judge in interpreting the Act would construe the word as meaning a reasonable time after. What that reasonable time would be would depend entirely on the circumstances of the particular case and as to which the judge must exercise a reasonable discretion. In *Maidlow* v. *Maidlow* (2) it was admitted that a mere agreement as to the amount of the maintenance did not oust the jurisdiction of the Court to vary it under s. 1, sub-s. 2 (*b*). It is submitted that the agreement here cannot bind the parties further than an order under s. 1, sub-s. 2, would have done, and that the Court has power to vary under proviso (*b*) of that sub-section. On the facts here the President was justified in coming to the conclusion that seven years was a reasonable time within which to file a petition. The husband has not been prejudiced by the delay.

Bucknill in reply. *Maidlow* v. *Maidlow* (2) was an entirely different case from the present. The wife had there obtained an order for maintenance.

[LORD STERNDALE M.R. I do not think that case has much bearing upon the present.]

LORD STERNDALE M.R. This is an appeal from the learned President which raises a difficult question. The facts are sufficiently stated by him in his judgment, and I need not do more, I think, than state them shortly. The decree absolute was pronounced on July 28, 1913. No application for maintenance after the decree was made by the wife until some seven years afterwards, and the reason given is that there was an arrangement constituted by letters between the solicitors to the parties, by which the wife was receiving

(1) (1878) 3 P. D. 47, 50. (2) [1914] P. 245, 248.

500*l.* a year from her husband after the decree. The letters dealt with matters both before and after the decree, that is to say, pendente lite, and then subsequently; but we have nothing to do with the agreement as to the payment pendente lite. The wife now comes to the Court and asks under s. 1 of the Matrimonial Causes Act, 1907, for an order for maintenance. [His Lordship read the section and continued:]

It was rightly said, I think, that in substance what the wife is seeking to do is to obtain an increase to the sum of 500*l.* a year payable to her, but the application is not an application to increase a sum payable under an order, because there is no order under which a payment is directed to be made, and, therefore, there is no sum payable under an order which can be increased. The application is that the wife may be allowed to file a petition asking for an original order for maintenance either under sub-s. 1 or sub-s. 2 of s. 1 of the Act, whichever the Court may think applicable, and that she may do so, as I say, after the expiration of seven years. The letters which constituted the arrangement or agreement, whichever it may be called, are the following: The first is in these terms: "Confirming our interview with you, our client is willing to pay alimony at the rate of 500*l.* per annum, the understanding being that your client will agree to accept permanent maintenance at the same rate. Will you kindly confirm this and let us have form of order for approval?" Therefore the agreement contemplated that there should be an order, and there was an order so far as the amount pendente lite was concerned. The second in answer to that is: "We are in receipt of your letter of yesterday's date, and our client accepts the offer therein contained. We will let you have draft order for approval in due course." For some reason which does not appear, alimony pendente lite was paid under that agreement not at the rate of 500*l.* per annum, but at the rate of 160*l.* per annum. This was apparently done under some arrangement as to which we have no information, and it was only after the decree absolute that the payment of 500*l.* per annum mentioned in the letters

C. A. 1920

SCOTT v. SCOTT.

Lord Sterndale M.R.

was made. The learned President has held that a petition for maintenance filed on November 17, 1919, is to stand as if filed within the time limited for filing such petition. He is there, I think, referring to r. 95 of the Divorce Rules, which provides that: "Applications to the Court to exercise the authority given by ss. 32 and 45 of 20 & 21 Vict. c. 85, and s. 5 of 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said Statutes such applications can be made, or within one month thereafter."

The first question is, what is the meaning of "on any decree for dissolution"? I was inclined at one time to think that it meant at the same time as the decree was made, or, as it could not precede it, at any rate immediately following upon it. Looking however at the decision of Sir James Hannen in *Bradley* v. *Bradley* (1) and *Sidney* v. *Sidney* (2) in the House of Lords which he follows, and also at *Robertson* v. *Robertson* (3), it seems to me that what Sir James Hannen calls a more elastic meaning must be given to the word "on" and that it does not mean "on" in the very narrow sense that I first thought it ought to be taken to mean, but that it must at any rate be limited to this extent—namely, it must be at the same time as the decree or within a reasonable time afterwards, and that what constitutes a "reasonable time" must no doubt depend on all the circumstances of the case. It appears to me that the learned President has not quite taken that view. He has, I think, taken it as meaning at the same time as or immediately after or within such time as the judge in his discretion may think the petition may be presented. That in my opinion is too wide. What constitutes "a reasonable time" is I know not very easy to define; but we have some guide, although I do not think it does lay down an absolute hard-and-fast rule, in what was said by Jessel M.R. in *Robertson* v. *Robertson*. (4) He said: "In the first place it appears that there is no instance of an application of this

(1) 3 P. D. 47.
(2) (1867) 36 L. J. (P. & M.) 73; reversing (1866) L. R. 1 P. & M. 78.
(3) 8 P. D. 94.
(4) 8 P. D. 96.

nature being made at so late a period as the present application. Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on.' 'On,' if not confined to the time of making the decree, must mean shortly after." In that case the time was eighteen months, but as the decision of the Court went in agreement with that of the learned President on the merits of the application and not really on the question of time, I do not think that statement ought to be taken as a decision as to the absolute limit. It does however point in the direction I have already indicated—namely, that the word "on" does not mean an unlimited time within the judge's discretion, but it does mean within a reasonable time having regard to all the circumstances of the case. That to my mind reduces this case to a very short question: Is the fact of the agreement or arrangement, whatever it may be called, having been made between the parties a circumstance that extends the reasonable time in this case to seven years? In my opinion it is not. It may be that the parties were not quite clear as to the actual effect of the agreement or arrangement they had made. It may be that they or their advisers were under the impression that an order had been obtained for the payment of this money. I do not think either of these circumstances is one that justifies the postponement of the application for an order for maintenance for this period. The present application, as I say, is really in substance an application for an order to increase the amount of the payment, because the husband's means have increased, for if that were not the object, I do not suppose an application for an order would ever have been made. The application would have been unnecessary so long as the 500*l.* per annum was considered a reasonable sum. I do not think that the order of the learned President can be maintained, because I think, with all respect to him, that he has proceeded upon a wrong principle—namely, that there is no

C. A. 1920

SCOTT v. SCOTT.

limit to the judge's discretion, whereas in my opinion there is a limit, and that limit must be, as Jessel M.R. defines it, shortly after, or as I define it, within a reasonable time after, having regard to all the circumstances of the case. I think, therefore, that this appeal must be allowed and the order set aside.

WARRINGTON L.J. The learned President has made an order that a petition for maintenance filed on November 17, 1919, do stand as if filed within the time limited for filing such petition, and the real question we have to decide is whether he was right in making that order. In substance, no doubt, the object of the petitioner was to obtain, not merely an order for maintenance, but an increase in the maintenance which had hitherto been allowed her under the agreement, but in order to obtain that increase it is necessary that there should be an existing order for maintenance, and, therefore, in reality her application was an application then for the first time for an order for permanent maintenance.

The decree nisi was made on January 17, 1913, and the decree absolute on July 28, 1913. It is now therefore more than seven years since the decree absolute was made. The question turns upon the construction of sub-ss. 1 and 2 of s. 1 of the Matrimonial Causes Act, 1907, which were substituted for s. 32 of the Matrimonial Causes Act, 1857, and s. 1 of the Matrimonial Causes Act, 1866 ; and is what is meant by the provision in s. 1 of the Act of 1907, that the Court may, if it thinks fit, on any decree for dissolution of marriage either (sub-s. 1) order the husband to secure to the wife an annual sum, or (sub-s. 2) instead of such order make an order on the husband for payment of a monthly or weekly sum for her maintenance. What is sought in the present case is an order for payment of a sum for maintenance which I suppose would be a weekly or monthly sum equal to so much per annum. What then is the meaning of the words " on any decree for dissolution " ? It was decided by Sir James Hannen in *Bradley* v. *Bradley* (1) that the word " on " was not to be construed in the narrow sense as meaning that the Court

(1) 3 P. D. 47.

may incorporate the order in the decree, or, if it makes a separate order, may make such an order only at the same time as the decree. All that the learned judge there really decided was that the order for maintenance might be a separate order and that it need not be contemporaneous with the decree, but might be made after it. If the order is to be made after the decree, what according to the true construction of the statute is the limitation to be placed upon the word "after" which by construction has been introduced? It was contended before us that it might mean within such time after as the Court in its discretion might think proper. In my judgment, with all respect to the learned President, who seems to have acted upon that view, that cannot be the construction of the statute. The only construction that it is possible I think to give to the statute, when once it is admitted that the order may be made after the decree, is that the order must be made within some reasonable time, and I do not doubt but that that was the view taken by Jessel M.R. in *Robertson* v. *Robertson* (1) in this Court. In that case he said: "Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on.' 'On,' if not confined to the time of making the decree, must mean shortly after." It is to be noticed that that judgment was a reserved judgment, and was delivered some fortnight after the argument had taken place, that in the course of the argument *Bradley* v. *Bradley* (2) had been cited, and, therefore, it would seem that the learned judge had in his mind the decision of Sir James Hannen that the order might be made after the decree, and on that he made the remarks which I have read. I think they certainly do not support any such contention as has been put forward before us, that the order may be made at such time after the decree as the judge in his discretion may think proper. It seems to me they can only mean at the same time as the decree or within a reasonable time afterwards.

(1) 8 P. D. 94, 96. (2) 3 P. D. 47.

C. A. 1920

SCOTT v. SCOTT.

Warrington L.J.

What is a "reasonable time" must be decided not by any resort to a judicial discretion, but having regard to all the circumstances of the particular case, and it becomes a matter of law as to what circumstances would justify the judge in coming to the conclusion that the time is reasonable. On that point I have nothing to add to what has been said by the learned Master of the Rolls. It is enough for me to say that, speaking for myself, I entirely agree with his view and that I can find nothing in the circumstances of this case which renders it reasonable to allow the application to be made more than seven years after the decree absolute has been pronounced. I, therefore, agree that the order must be set aside.

SCRUTTON L.J. In differing from the judgment of the learned President I will express my judgment in my own words as shortly as I can. The wife obtained a decree absolute for the dissolution of her marriage in July, 1913. On June 17, 1920, seven years afterwards, she came to the judge to obtain leave to file a petition for maintenance. I do not overlook the fact that in the previous year she had applied to the Registrar for that order, but it appears to me quite clear that the Registrar had no original jurisdiction to give such leave under the rules, and I do not propose in this case to express any opinion as to what was the effect of the husband's appearance, as to whether it would in any way give to the Registrar jurisdiction which he did not originally have, because the question here is whether the learned President in 1920 had power to give the leave which he did give. Whether or not the learned President had power to give that leave depends on the true construction of s. 1 of the Matrimonial Causes Act, 1907, which gives the Court power "on any decree for dissolution or nullity of marriage" to order the husband to secure to the wife a sum of money and "in any such case" to make an order on the husband for payment of a monthly or weekly sum. The words "in any such case" appear to me to relate to "on any decree for dissolution or nullity of marriage" and the question is, therefore,

what limit is imposed for the making of any application "on any decree for dissolution or nullity of marriage." Lord Denman C.J. in *Reg.* v. *Arkwright* (1) says: "The words 'on' or 'upon' (it has been decided) may 'either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require,' 'with reference to the context, and the subject-matter of the enactment.'" A series of cases on various branches of the law has been decided in which the word "on" has been given one or other of those meanings. Lord Denman does not say, as he might have said: "I think it means all three." In this case I think it means all three. The section expressly provides that the Court may suspend the pronouncing of its decree until the deed which it has ordered to be executed has been executed, and, therefore, "on any decree" may cover a case before the decree is made. Obviously the order for security may be embodied in the decree. The word "on" may, therefore, mean exactly simultaneously, and, lastly, in the opinion of the House of Lords in *Sidney* v. *Sidney* (2), the order may be made after the decree, not embodied in the decree but made after it, and in view of the fact, as has been pointed out by Sir Ellis Hume-Williams, that the ability and fortune of the husband have to be considered, the order for security for maintenance may be made after the decree for dissolution or nullity of marriage. But although the order may be made after the decree for dissolution or nullity of marriage there still arises the question, is there any limit of time within which it may be made? Can the wife come and say: "I am going presently to present a petition for dissolution of marriage and in the meanwhile I make an application for permanent maintenance in case I succeed"? Obviously not; that would clearly be made an unreasonable time before; or can she say: "Twenty years ago your Lordship gave me a decree for dissolution of marriage, now will you make an order for permanent maintenance?"—and say nothing more? Again, it seems to me equally obviously not. There is some limitation to be implied

(1) (1848) 12 Q. B. 960, 970. (2) 36 L. J. (P. & M.) 73.

C. A. 1920

SCOTT v. SCOTT.

Scrutton L.J.

in the temporary nature of the order for security as to the order or decree for dissolution. In my view that limitation is this, that inasmuch as the matters to be considered are matters which should be in the mind of the judge at the time when he is making the decree for dissolution of marriage, the limitation is that the application should be made within a reasonable time from the decree for dissolution of marriage. As to what period of time that means one has the guidance of Jessel M.R.'s views in *Robertson* v. *Robertson* (1), to which we were referred, but at the time when that case was decided there was no case in which the power had been exercised more than a year after the decree, and the learned judge could hardly conceive that a period of more than a year could be included in the word "on." In that particular case the time was eighteen months. I see the same limitation has been approved in *In re Leigh* (2), where the power of the Court was sought to compel a ward of Court to make a settlement "upon or in contemplation of" the marriage. There had been a dispute as to whether those words gave the Court power to compel a post-nuptial settlement to be made, and Cotton L.J. after there referring to the judgments of the majority of the Court of Appeal in *In re Sampson and Wall* (3) said: "But I see nothing in their judgment which would in any way favour the conclusion that this settlement can be considered as a settlement made upon the occasion of the marriage, when there was this considerable length of time intervening between the marriage and the order of the Court." There "this considerable length of time" which Cotton L.J. thought prevented the Court from ordering the settlement to be made "upon" the occasion of the marriage was eight months after the marriage which he thought was too long a period to allow to elapse before the application was made. Without going through the other cases, seven or eight of which I have referred to while counsel have been arguing this case, I think in this particular case the application ought to have been made within a reasonable time after the decree for dissolution,

(1) 8 P. D. 94, 96. (2) (1888) 40 Ch. D. 290, 295.
(3) (1884) 25 Ch. D. 482.

and I see nothing whatever in the circumstances of this case to justify an application being made seven years after the decree. It is not necessary to discuss whether there was an agreement, although I have no doubt as to there being a consideration to support it, or as to what exactly was the agreement made; but, like the Master of the Rolls, I can see nothing whatever in this case which would allow any judge to say that there were circumstances from which he could find in his discretion that seven years was a reasonable time to wait before applying for this order.

For these reasons I concur in the judgments which have been pronounced.

Appeal allowed.

Solicitors for petitioner: *Reid Sharman & Co.*
Solicitors for respondent: *J. D. Langton & Passmore.*

W. I. C.

PROBATE.

1920
Nov. 22.

In the Estate of GUSTAV BLUHM (DECEASED).

Practice—Administration—Enemy Debt—Debt due from an English Firm payable before the War to Enemy since deceased—Clearing Office for Enemy Debts—Grant of Administration to Controller—Treaty of Peace Order, No. 1517 (*S. R. & O.*, 1919, *II.*, *p.* 198), *s.* 1 (*i*), (*ii*), (*iv*)—*Treaty of Versailles, S. III., Debts, Art.* 296.

Where a German domiciled in Germany died entitled to a debt from an English firm due before the war, which, under the provisions of the Treaty of Peace Order, 1919, can only be paid through the Clearing Office, and that debt is his only asset in England, administration to his estate, confined to that debt, may be granted to the Controller of the Clearing Office under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77), without notice to any other persons.

THIS was a motion by the Controller of the Clearing Office for enemy debts for a grant of administration to the estate of Gustav Bluhm, deceased, limited to a debt of 4000*l.* owing to him by an English firm.

The Clearing Office was established in pursuance of the

1920

GUSTAV BLUHM, *In the Estate of.*

Treaty of Versailles and the Treaty of Peace Order, 1919, No. 1517 (S. R. & O., 1919, II., p. 198). (1)

The provisions of the Treaty and Order, so far as they affect this motion, are set out below. (2)

(1) A later amending Order of 1920 is not material to the subject of this report.—J. R. B.

(2) TREATY OF VERSAILLES.

Section III., Debts.

Article 296.

"There shall be settled through the intervention of clearing offices to be established by each of the High Contracting Parties within three months of the notifications referred to in paragraph (*e*) the following pecuniary obligations:—

(1.) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory. . . . .

(4.) The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section:—

(*a*) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing offices.

(*b*) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or has given formal indication of insolvency or where the debt was due by a company whose business had been liquidated under emergency legislation during the war. . . . .

ANNEX.

1. Each of the High Contracting Parties will, within three months from the notification provided for in Article 296, establish a clearing office for the collection and payment of enemy debts.

5. . . . . The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will, in due course, inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case, the Debtor Clearing Office will give the grounds for the non-admission of debt.

6. When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

11. The balance between the clearing offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

THE TREATY OF PEACE ORDER, 1919.

1. The Sections of the Treaty set out in the Schedule to this Act shall have full force and effect as law, and for the purpose of carrying out the said Sections the following provisions shall have effect:—

(i) There shall be established in the United Kingdom a Clearing Office under the control

1920

GUSTAV BLUHM, *In the Estate of.*

Gustav Bluhm died in Hamburg on April 13, 1916, a German subject domiciled in Germany. His only asset in the United Kingdom was the said debt of 4000*l.* owing from Messrs. Moss & Bluhm, an English firm carrying on business in London. This debt was payable before the war. It was admitted by the debtors and was registered with the Custodian under the Trading with the Enemy Acts.

The Controller of the Clearing Office had first obtained knowledge of the existence of the debt in February, 1920, and had applied to Messrs. Moss & Bluhm for payment. They admitted the debt, but stated that as Gustav Bluhm was dead they could only pay it to a duly appointed administrator of his estate in this country. The Controller therefore applied for a grant of administration limited to the debt. The Public Trustee, who holds the office of Custodian under the Trading with the Enemy Acts, consented to the application.

T. Bucknill for the motion. This is the first application for a grant of administration to the Controller of the Clearing Office. Art. 296 of the Treaty of Versailles provided that debts payable before the war due by a national of one contracting Power residing within its territory, to a national of an opposing contracting Power residing within the territory of the latter, were to be settled through clearing offices to be established by each Power. By the Treaty of Peace Order, 1919, a clearing office was established under the control of a Controller; and it was provided in pursuance of further provisions of the Treaty, that it should not be lawful for any person to pay or receive payment of any enemy debt otherwise than through the Clearing Office, and that the Clearing Office

and management of such person (hereinafter referred to as the Controller). . . . .

(ii) It shall not be lawful for any person to pay or accept payment of any enemy debt except in cases where recovery thereof in a court of law is allowed as hereinafter provided, otherwise than through the Clearing Office. . . . .

(iv) The Clearing Office shall have power to enforce the payment of any enemy debt against the person by whom the debt is due, together with such interest as is payable under paragraph 22 of the Annex to the said Section III., and for that purpose shall have all such rights and powers as if they were the creditor. . . . ."

1920

GUSTAV BLUHM, *In the Estate of.*

should have full powers to enforce payment of any enemy debt against the person from whom the debt is due, and for that purpose should have all such rights and powers as if they were the creditor.

In this case the debt cannot be recovered without a grant of administration, and I ask for a grant under s. 73 of the Probate Act, 1857, limited to the particular debt and interest.

[THE PRESIDENT. The Controller is in the position of a creditor, why should he not take a general grant ?]

T. Bucknill. He would in that case require leave to prefer his own debt, and, moreover, he has no power to deal with any other property, he is bound to pay over whatever he receives direct to the German Clearing Office.

[THE PRESIDENT asked whether the notice given to the German Clearing Office identified the debt.]

T. Bucknill. Yes.

SIR HENRY DUKE P. I think that I can regard the Treaty of Peace as an assignment of interests and can dispense with any further notice of the application. I will make a grant to the Controller limited to the 4000*l.* due from Messrs. Moss & Bluhm to the estate of the testator, the grant to be surrendered when the sum has been disposed of. The will need not be annexed to the grant. As the Controller's rights override any testamentary disposition, he may merely state, in his oath to lead the grant, his belief that there is a will.

The costs of the Controller's application will be paid out of the fund, and he need not give security. He will merely file a declaration.

T. Bucknill. Will your Lordship state whether future applications of this kind should be made by motion ?

THE PRESIDENT. These are grants in special circumstances. The Controller in his statutory capacity is outside the normal procedure of the Court. I think applications must be made by motion until further order.

Solicitor : *The Solicitor to the Clearing Office.*

J. R. B.

DIVORCE.

1920
Nov. 19, 24.

WILLIAMS *v.* WILLIAMS.

Divorce—Wife's Petition for Restitution of Conjugal Rights—Deed of Separation —Covenant not to sue for Restitution —Deed not pleaded by Husband—No Evidence of Repudiation of Deed—Decree made notwithstanding Covenant.

A covenant by the wife in a separation deed not to sue for restitution of conjugal rights is not a bar to her petition for restitution if the husband does not set up the deed: provided that the Court is convinced of the sincerity of the wife in asking her husband to return.

Opinion of Gorell Barnes P. in *Kennedy* v. *Kennedy* [1907] P. 49, 52, not followed.

THIS was a wife's petition for restitution of conjugal rights.

The parties were married on September 28, 1905. There were two children of the marriage. On November 20, 1915, the husband left his wife, and on March 3, 1916, a deed of separation was executed by which the parties agreed to live apart and that the wife should have the custody of the children. The husband covenanted to pay the wife 180*l.* a year by monthly instalments, and the wife covenanted not to take any proceedings against him for restitution of conjugal rights. The instalments of the allowance were not at first regularly paid, and from time to time the wife obtained judgment against her husband for arrears. In November, 1919, she obtained judgment for about eleven months' arrears, and from that time the instalments had been regularly paid. In January, 1920, the wife wrote to her husband a letter asking him to return and make a home for their children. The husband sent an immediate answer definitely refusing to return.

This petition was then filed and served on the husband, but he did not appear or file any answer.

Noel Middleton for the petition. It has always been the rule of this Court that if the husband, respondent in a restitution suit, does not set up a separation deed containing a

1920

WILLIAMS v. WILLIAMS.

covenant by the wife not to apply for restitution, the Court is not bound to set it up for him.

That rule was stated by Hannen P. in *Tress* v. *Tress* (1), following, as I submit, the established practice. The dictum of Gorell Barnes P. in *Kennedy* v. *Kennedy* (2) has not been followed: see *Phillips* v. *Phillips* (3); and even in *Kennedy* v. *Kennedy* (2) the order for restitution was made.

In *Roe* v. *Roe* (4) Shearman J. held that if a husband fails to pay the allowance provided by a separation deed, and the wife takes steps to enforce the payment, she cannot afterwards plead desertion. But that was a petition for divorce; it does not apply to a petition for restitution of conjugal rights.

Cur. adv. vult.

Nov. 24. SIR HENRY DUKE P. At the hearing it became necessary to consider what were the rights of the petitioner having regard to the terms of the agreement under which she and her husband lived apart, and in view of the existence of conflicting decisions on the subject, and in particular *Tress* v. *Tress* (1) and *Kennedy* v. *Kennedy* (2), I took time to consider my judgment.

The petitioner stated in her evidence that since proceedings in her last action for arrears, the respondent had regularly paid to her account what was due under the deed, but she had not seen the respondent since November 20, 1915; that she had made her request for the resumption of cohabitation in what she thought to be the interests of the children, but no question of divorce had been discussed between herself and the respondent; and when she wrote her letter she sincerely desired that her husband should do what she proposed. These statements of the petitioner I believe to be true. I think, however, that she now expects to be able to proceed for dissolution of marriage, and intends to do so. I do not find that the husband has repudiated the agreement.

Tress v. *Tress* (1), the earlier of the two cases I have

(1) (1887) 12 P. D. 128.
(2) [1907] P. 49.
(3) [1917] P. 90.
(4) [1916] P. 163.

mentioned, was a decision of Sir James Hannen in an undefended suit for restitution of conjugal rights. It was brought to the notice of the Court that there was a separation deed, and that the petitioner had covenanted not to sue for restitution.

Sir James Hannen pointed out that there may be circumstances in which such a covenant would not be binding. It lies on the respondent, he said, to put in a valid answer, and he made the decree.

In *Kennedy* v. *Kennedy* (1) Sir Gorell Barnes considered the opinion so stated in *Tress* v. *Tress* (2), and expressed definitely his disagreement with it. In the course of a reasoned judgment he says: "The Court must be at liberty to consider the position of the petitioner who is living apart from her husband under a deed of separation. Her claim to restitution rests on the separation of the parties being without good cause; and such a claim cannot properly be maintained where there is a deed with such a covenant as this, which is itself, prima facie, good cause for the separation. It is equally clear that the Court is entitled to consider the effect of the deed, even if the husband does not appear and set it up. . . . . But this is not all that there is to be said about this matter, because, looking back at the history of the whole subject, in my opinion it remains for the Court to consider whether in the circumstances it should hold the deed to be a bar. . . . . And I think the Court should not allow its hands to be tied by the covenant not to sue in a case such as the present, where the obligation to pay has been repudiated." A decree was, however, granted in that case on the ground that the respondent had repudiated the deed.

In the present case, since I do not find a repudiation of the deed, I cannot make a decree upon the petition if I am to follow the opinion which I have cited from *Kennedy* v. *Kennedy*. (3) The question involved is whether, subject to satisfactory evidence of sincerity on the part of the petitioner, she is entitled as of right to maintain this suit. Under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85),

(1) [1907] P. 49, 52. (2) 12 P. D. 128.
(3) [1907] P. 49.

1920

WILLIAMS v. WILLIAMS.

The President.

ss. 17, 22, the Court in a case like this on being satisfied of the truth of the allegations contained in the petition, and that there is no legal ground why a decree should not be granted, may decree restitution of conjugal rights, and must "proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief." In the Ecclesiastical Courts a covenant not to sue for restitution of conjugal rights did not bar a suit for restitution. Sir William Scott said in *Mortimer* v. *Mortimer* (1): "These Courts, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants as insignificant in a plea of bar." In *Hunt* v. *Hunt* (2), where Lord Westbury asserted the right in equity of the obligee of such a covenant to enforce it in a suit in Chancery for an injunction, he clearly recognized that in the Ecclesiastical Courts the covenant would be ignored. After the judgment in *Hunt* v. *Hunt* (2), Sir Cresswell Cresswell in *Spering* v. *Spering* (3) overruled a plea in bar founded on such a covenant. In *Crabb* v. *Crabb* (4) Lord Penzance upheld a defence based on a separation deed on the ground that the deed was inconsistent with the allegation of desertion without cause. In *Matthews* v. *Matthews* (5) the Judge Ordinary and the Full Court dismissed on the ground of want of sincerity a suit for judicial separation in which the petitioner was party to a separation deed and was apparently using the power of the Court for the purpose of obtaining a pecuniary advantage.

Since the Judicature Act, 1873 (36 & 37 Vict. c. 66), there have been numerous cases in which it has been held that the refusal of a party to comply with the requirements of a deed of separation amounted to a repudiation of the deed. It has been recognized in *Morrall* v. *Morrall* (6) and

(1) (1820) 2 Hagg. Con. 310, 318.
(2) (1861) 4 D. F. & J. 221.
(3) (1863) 3 Sw. & Tr. 211.
(4) (1868) L. R. 1 P. & M. 601.
(5) (1859) 1 Sw. & Tr. 499; (1860) 3 Sw. & Tr. 161.
(6) (1881) 6 P. D. 98.

in the Court of Appeal in *Gandy* v. *Gandy* (1) that a new state of facts not contemplated when the deed was executed may relieve the parties from its obligations.

This case is not directly covered by any of these authorities. It is within the principle discussed in *Tress* v. *Tress* (2) and *Kennedy* v. *Kennedy*. (3) Upon the question whether the Court is bound to set up, as between a petitioner and an absent respondent in a case like the present, an investigation into the question whether the suit is barred by a deed made between the parties, it is to be borne in mind that the right to refuse cohabitation by reason of the existence of a separation deed is a purely personal right of the party sued, the assertion of which does not apparently serve any public interest. Lord Westbury in his judgment in *Hunt* v. *Hunt* (4) made some observations which seem to me apposite in this connection: "No man can renounce a right of which his duty to the public and the claims of society forbid the renunciation. But if this voluntary separation is a state of things which by the consent of the parties may be created and created without offence, then it falls within the scope and ambit of the ordinary power of contracting." Further, the parties in the present case have been at liberty at all times since the execution of the deed to modify its terms or to rescind it by a subsequent deed or agreement. The respondent has not appeared, and for all I know he welcomes the action of the petitioner as amounting to a repudiation of the deed and a discharge of his liabilities thereunder. I do not think myself at liberty in this purely personal question between the parties to enforce in this suit obligations upon which neither of them thinks fit to rely. If hereafter there should be proceedings for divorce, the duty of the Court will arise under the Matrimonial Causes Act, 1857, ss. 29, 30 and 31, as in every case of dissolution. Here the only question is that of restitution.

Where once the petitioner is free from any effect of the deed, there remains only the inquiry whether she was sincere

(1) (1882) 7 P. D. 168.
(2) 12 P. D. 128.
(3) [1907] P. 49.
(4) 4 D. F. & J. 221, 233.

1920

WILLIAMS v. WILLIAMS.

in the request she made to her husband. I believe she was, and she is entitled as of right to a decree of restitution of conjugal rights as claimed by her petition.

Solicitors for petitioner: *Lawrence Jones & Co.*

J. R. B.

NOTE.—In *Pugh* v. *Pugh*, decided on November 18, 1920, a wife's petition for restitution of conjugal rights in a case where the parties had been living apart under a deed of separation, Horridge J. said he was bound by the practice of the Court not to look at the separation deed, and made the order for restitution, though he considered that the return of the husband was the last thing the petitioner wished.

Tyndale for the petitioner.
Solicitor: *W. Drake.*

J. R. B

1920
May 11, 12; *Dec.* 14, 20.

DIVORCE.

RUTTER *v.* RUTTER.

Divorce—Practice—Costs—Infant Husband's Petition—Guardian ad litem—Petition dismissed—Liability for Costs.

The guardian ad litem of an infant husband who is a petitioner in the Divorce Division is in the same position as a next friend in the Chancery and King's Bench Divisions as to costs, and is liable to be ordered to pay the costs of an unsuccessful petition apart from any question of misconduct.

THIS was an application by the wife, respondent in a divorce suit commenced by her husband, a minor by his guardian ad litem, for an order that the guardian should pay the costs of the suit which had failed.

The parties were married in April, 1918, when the husband was nineteen and the wife fifteen. On August 5, 1919, the husband, being then twenty years of age, presented a petition for divorce, expressed to be the petition of the husband, H. L. C. Rutter by H. C. Rutter his guardian, and was signed both by the petitioner and his guardian, who was his father.

The petition alleged that the respondent had committed adultery with a man unknown and had communicated venereal

disease to the petitioner, and asked for dissolution of the marriage. The wife by her answer denied these allegations and alleged that the husband had committed adultery with several women and had thereby contracted disease which he had communicated to her. She prayed that the petition might be dismissed and her marriage dissolved. In reply the husband denied the allegations in the answer.

The case was tried before Horridge J. on May 11, 12, 1920.

The judge found the facts in favour of the wife, dismissed the petition, and granted the wife a decree nisi on the cross-charges in the answer.

Counsel for the respondent then asked that the order for costs should be made against both the petitioner and his guardian.

Counsel for the petitioner objected that there was no precedent for such an order, and after some discussion the matter was adjourned for argument.

The costs of the respondent were taxed at 419*l.* 3*s.* 9*d.*, and on November 8, 1920, an order for payment of that amount was served on the petitioner, but the money was not paid.

On November 8, 1920, the petitioner took out a summons for discharge of the guardian, the petitioner having attained twenty-one on July 28, 1920. This summons was adjourned until the application as to costs had been heard.

McCall K.C. and *Le Bas* for the respondent's application. A guardian ad litem of an infant, party to an action in the Divorce Division, is appointed for the same purpose as a next friend in the Chancery and King's Bench Divisions, and the principle on which the appointment is made is that there should be some one before the Court who could contract with the Court, control the proceedings, and give the defendant security for his costs. That is established by the practice of the Chancery and King's Bench Divisions for 200 years: see Annual Practice for 1921, p. 249, note to Order XVI., r. 16; *Slaughter* v. *Talbot* (1); *Marnell* v.

(1) (1739) Willes, 190.

1920

RUTTER v. RUTTER.

Pickmore. (1) The rule there laid down was adopted by the Court of Exchequer in *Sinclair* v. *Sinclair* (2), and by the Exchequer Chamber in *Collins* v. *Brook.* (3)

In *Beavan* v. *Beavan* (4) there is a note to the report in the Law Journal that a summons had been taken out on the part of the wife (respondent) that the guardian ad litem of the husband (petitioner) should pay into the Registry a sum sufficient to answer the costs of the wife; it was opposed, but the Judge Ordinary held that the guardian as he had instituted the suit was liable for the wife's costs, and ordered accordingly. The case is also reported in the Law Times, but this note is not given there. *Dyke* v. *Stephens* (5) and the observations of Chitty J. in *In re Duke of Somerset* (6), where the question was whether a married woman could be appointed a guardian ad litem, are further authorities that in the Chancery and King's Bench Divisions the object of appointing a next friend was to have some one who was liable for the costs.

In *Vivian* v. *Kennelly* (7) Lord Hannen ordered the guardian ad litem of an infant defendant in a probate action to pay the costs.

[They also referred to *Harvey* v. *Lovekin* (8) and *Giles* v. *Giles.* (9)]

In *Paspati* v. *Paspati* (10) Sir Samuel Evans held, notwithstanding some earlier decisions, that the Court had power to order a guardian ad litem to file an affidavit of documents.

In Rayden on Divorce, p. 195, the author appears to limit the liability of a guardian ad litem or next friend of a wife for costs to cases of incautious action on his part. He quotes *Brown* v. *Brown.* (11) In that case Dr. Lushington decided that a guardian ad litem of an infant wife who had been guilty of misconduct could be ordered to pay the costs; the case does not apply to the guardian ad litem of an infant

(1) (1796) 2 Esp. 473, 474.
(2) (1845) 13 M. & W. 640.
(3) (1860) 29 L. J. (Ex.) 255, 256.
(4) (1862) 31 L. J. (P.) 166; 7 L. T. 435.
(5) (1885) 30 Ch. D. 189.
(6) (1887) 34 Ch. D. 465.
(7) (1890) 63 L. T. 778.
(8) (1884) 10 P. D. 122.
(9) [1900] P. 17, 18.
(10) [1914] P. 110.
(11) (1850) 2 Rob. Ec. 302.

husband. It rests upon the fact that the wife could not be liable for costs.

Hawke K.C. and *Grazebrook* for the petitioner. We do not dispute that the next friend of an infant was liable to be ordered to pay costs in the Chancery and King's Bench Divisions. That was the old practice adopted by the rules of the Supreme Court, but those rules do not apply to the Divorce Division: see Order LXVIII., r. 1. The Divorce Practice is governed by the Divorce Rules 105–108. Those rules do not provide for the appointment of a next friend, but of a guardian, who is appointed solely for the protection of the infant and not for the sake of securing the costs.

In *Brown* v. *Brown* (1) no distinction is made between the guardian of a husband and the guardian of a wife. The guardian there was made responsible, because he had instituted the suit. Here the respondent is claiming the costs of the claim brought forward in her answer; clearly the husband's guardian did not institute that.

[HORRIDGE J. having suggested a doubt whether the two sets of costs stood on the same footing, McCall K.C. said that in this case the inclusion of the costs of the wife's answer would make little difference, and withdrew the claim for these costs.]

The point in *Beavan* v. *Beavan* (2) on which the respondent relies is found only in a note in the Law Journal.

[HORRIDGE J. I have had the record examined and it confirms the note.]

The report of that case in the Law Times shows that the order was made against the guardian because he instituted the suit.

The cases of *Morgan* v. *Morgan* (3) and *Quinn* v. *Quinn* (4) are in our favour.

In *Slingsby* v. *Attorney-General* (5) the guardian ad litem of an infant petitioner in a suit under the Legitimacy Declaration Act was ordered to pay costs, but the point was

(1) 2 Rob. Ec. 302.
(2) 31 L. J. (P.) 166; 7 L. T. 435.
(3) (1865) 12 L. T. 199.
(4) [1920] P. 65.
(5) (1916) 32 Times L. R. 364.

1920

RUTTER v. RUTTER.

not argued. The object of the Divorce Rules in directing the appointment of a guardian was the protection of the infant only; this object will be defeated if the guardian is always liable for costs, for persons will hesitate to accept the office.

HORRIDGE J. [after stating the facts]. The matter now comes before me upon the application of the respondent for condemnation of the petitioner's guardian in the costs of the dismissal of the husband's petition; she does not ask for the costs of her answer by way of cross-petition, and I have not therefore to decide any question as regards the liability of the guardian for those costs. I express no opinion upon that matter, which is, in my opinion, a different question.

It is not disputed that by the practice of the King's Bench and Chancery Divisions the next friend of an infant plaintiff is liable for the costs of the suit; but it is said that no such status as that of next friend is known in the Divorce Division where the rules provide that an infant must sue by his guardian.

Divorce Rule 105 provides as follows: "A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervener in a cause."

Here the petitioner was over seven and he appointed his father, by writing, as his guardian to sue on his behalf. The petition was signed both by the petitioner and his guardian, and the præcipe for the citation was sent in by the solicitors on behalf of both. In these circumstances is the guardian of an infant petitioner in the same position as a next friend?

It is said that the decision in *Brown* v. *Brown* (1) shows that before the guardian of an infant petitioner can be condemned in costs, the guardian must have been guilty of improper conduct. I think that that case turns entirely on the fact that the guardian there was the guardian of an infant wife. In the Divorce Division a wife, unless she has

(1) 2 Rob. Ec. 302, 309.

separate estate, is never condemned in the costs of a divorce suit. Her position is discussed by Dr. Lushington in *Brown* v. *Brown* (1), where he says: "The case of a wife, in respect of costs, stands on a totally distinct footing. It is almost a wasteful expenditure of time to state that, according to legal principles, a wife is supposed to have no separate property. These Courts, in consequence, have always allowed the wife to sue, and to have her costs paid by her husband, except in particular cases, where she has had a sufficient property settled to her sole and separate use; yet, even in those instances, the Court has never allowed, as far as my information extends, the costs of the husband against the wife." My own knowledge tells me that that is not quite accurate as regards the present practice. Now, after notice has been given and upon proof of separate estate, a wife is sometimes condemned in costs. That practice no doubt has sprung up since the Married Women's Property Acts. The next friend of a wife petitioner therefore knows that in ordinary circumstances no costs can be ordered against the wife, and I can well understand that, if he behaves properly, he should be regarded as no more liable to pay costs than is the wife herself.

However that may be I feel bound by the decisions in *Beavan* v. *Beavan* (2) and *Slingsby* v. *Attorney-General.* (3) *Beavan* v. *Beavan* (2) is reported on the question whether a wife can obtain an order for alimony against the husband's guardian ad litem. In the report in the Law Journal there is the following note: [His Lordship read the note and proceeded:] Mr. Hawke for the guardian ad litem says that case does not apply, because of the words in the note "as he had instituted the suit," and refers to the report in the Law Times to show that the people who were really the active promoters of the suit were the infant's friends and guardian who brought the suit on his behalf. That may be quite accurate; but there was no question of misconduct on the part of the guardian in that case, yet

(1) 2 Rob. Ec. 302, 309. (2) 31 L. J. (P.) 166; 7 L. T. 435.
(3) 32 Times L. R. 364.

1920

RUTTER v. RUTTER.

Horridge J.

an order to secure the costs of the hearing was made against the guardian. I think *Beavan* v. *Beavan* (1) is a direct authority that apart from any question of misconduct the guardian ad litem of an infant husband petitioner can be ordered to give security, and that order can only be made on the footing that the guardian is liable for costs.

Slingsby v. *Att.-Gen.* (2) was a suit under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), but by Divorce Rule 174, Rule 105 is made to extend to these suits. It was a suit brought on behalf of an infant petitioner, and the Court of Appeal reversed the decision of Bargrave Deane J. in his favour. An application was then made that the costs of the petition might be paid by the infant's guardian, and the Court of Appeal ordered the infant and his guardian to pay the costs both in the Court of Appeal and below.

These two decisions are direct decisions that the person who acts as guardian to an infant petitioner is liable for the respondent's costs of the proceedings. I am glad that the cases so decide, because I think that is the right rule. In my opinion the same rule that applies in the Chancery and King's Bench Divisions ought to apply in the Divorce Division and for the same reasons.

After further discussion His Lordship made an order discharging the petitioner's guardian ad litem from office as from July 28, 1920, when the petitioner attained twenty-one, the respondent's costs of that application to be paid by the petitioner. He made an order that the petitioner's guardian ad litem should pay the respondent's costs of the suit incurred before July 28, 1920, other than the costs (if any) occasioned by her cross-prayer for relief, and the respondent's costs of this application.

Solicitors for petitioner : *Ellis, Munday & Clarke.*
Solicitors for respondent : *Beardall & Co.*

(1) 31 L. J. (P.) 166; 7 L. T. 435. (2) 32 Times L. R. 364.

J. R. B.

DIVORCE.

1921
Feb. 21.

WILLMOTT *v.* WILLMOTT.

Divorce—Practice—Matrimonial Home—Petition for Restitution of Conjugal Rights—Right of Wife to reside in Matrimonial Home pending Suit—Injunction.

There is no general rule that, pending a matrimonial suit, either party has an absolute right to remain in the matrimonial home, apart from the right of property in that home. Every case in which a question arises on this matter must be dealt with according to its individual facts.

In this case the wife filed a petition for restitution of conjugal rights. The husband had left his wife alone in the matrimonial home on the ground, as he alleged, that her persistent drunken habits made it impossible to live with her in the home and were most injurious to their children. She filed her petition on January 8, 1921; on the next day she received from her husband's solicitors a peremptory notice in writing to leave the matrimonial home within one week. At the same time her husband offered her 5*l.* a week for maintenance and to find her accommodation. It was also stated and not denied that she had offers of accommodation from relatives of her own. She refused to leave, and, after some further correspondence, gave notice of motion for an injunction restraining her husband from preventing her living in the matrimonial home, taking her property and otherwise molesting her. There was no serious evidence of taking her property or molestation, but all the facts were vehemently disputed. The husband stated his income at 500*l.* a year; the wife said it was 1200*l.* The house was the husband's property, and he returned to live there before the motion was heard, but did not occupy the same room as his wife. The wife had filed a petition for alimony pendente lite, but the petition had not been heard.

The motion now came on for hearing.

Clifford Mortimer for the motion. The wife being in the matrimonial home is entitled to remain there until she is found

1921

WILLMOTT v. WILLMOTT.

guilty of a matrimonial offence, or at least till her alimony pendente lite is provided for.

In *Callaby* v. *Callaby* (1) an application by the husband to get the wife turned out was refused, though the charge was adultery. Here the charge is only drunkenness; and even if it is true the husband is not entitled to give the wife peremptory notice to quit without adequate provision.

[He also referred to *Northledge* v. *Northledge*. (2)]

J. B. Melville for the husband. It is not contended that the husband has the right to treat his wife as a trespasser. But he is clearly entitled to keep her out of the house. He can do so, if he desires, by selling the house and the furniture, which are his property. He has offered to provide for her amply.

HILL J. This application is by the wife, petitioner in a suit for restitution of conjugal rights, for an injunction restraining the husband, the respondent, from preventing her living in the matrimonial home of the parties. [His Lordship then stated the facts as above and proceeded:] There is considerable controversy in the affidavits as to the merits of the suit, but that is for the trial. I cannot decide it now.

It is said on the part of the wife that she cannot do otherwise than remain where she is, because she has a right to be in the home until the hearing, or at any rate till the amount of her alimony pending the suit is settled. A petition for that purpose is on the file. The wife alleges that the husband's means are 1200*l.* a year, while he only admits 500*l.* It is obvious that if he is right the offer is a generous one. The wife, however, insists on remaining where she is, and that her husband should be left to take what legal steps he can to remove her. The husband declines to take this view and insists on his wife's departure.

It is quite clear that the parties are at daggers drawn. I cannot determine to-day the acute controversy whether

(1) (1920) 37 Times L. R. 241. (2) (1894) 70 L. T. 815.

the wife is a drunkard reclaimed or not. The question is what is to be done till I can determine it.

I am not prepared to assent to the proposition that in all circumstances there is an absolute right in either party to remain, pending the suit, in the matrimonial home. The very fact that the Court is called upon to deal with such a question shows that regard must be had to the facts of each individual case. As far as I can judge the husband has made his wife an adequate offer; but that also has to be determined. It may turn out that the husband has a larger income.

In the circumstances it is clear to me that it is only likely to lead to further trouble if I proceed on the motion. I do not think I ought to add to the existing troubles. I am dealing with a particular case on its individual facts. I do not think I am bound by any absolute rule. The amount of alimony must be settled as speedily as possible. I hope that that will put a stop to this miserable state of things. I dismiss the motion. The wife must have her costs.

Solicitor for petitioner: *John Carnegie.*
Solicitor for respondent: *W. Ewart Craigen.*

J. R. B.

C. A.

1921

Jan. 14, 17.

[IN THE COURT OF APPEAL.]

THE TURID.

Admiralty—Charterparty—Custom of Port—Custom inconsistent with Charterparty—"Cargo to be taken from alongside at charterers' expense as customary"—Exclusion of Evidence of Custom throwing Expense on Shipowner.

The defendants, timber merchants at Yarmouth, chartered the plaintiffs' vessel to carry a cargo of timber to Yarmouth. Under the charterparty the vessel had to deliver the cargo at Yarmouth "always afloat . . . . cargo to be . . . . taken from alongside the steamer at charterers' risk and expense as customary." To lie "always afloat," the vessel could not come within about thirteen feet of the quay. In these circumstances the custom of the port was to erect wooden stagings between the ship and the quay, and for stevedores employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the stagings and to put it down 10 or 12 feet from the edge of the quay. Under the custom the whole of this work was carried out at the expense of the shipowners.

The plaintiffs objected that the custom was inconsistent with the provision in the charterparty that the charterers had to take the cargo from "alongside" at their expense and sued for the difference between the cost of the whole work and the rate for delivery at the ship's rail. The Divisional Court (Duke P. and Hill J.), affirming the decision of the county court judge sitting at Yarmouth, held, following the decision of the Court of Appeal in *Holman* v. *Wade*, "The Times," May 11, 1877, that the custom was inconsistent with the charterparty and that the plaintiffs were entitled to succeed. The defendants appealed:—

Held, without giving any decision as to what the judgment of the Court would have been in the absence of *Holman* v. *Wade*, that the case could not be distinguished from *Holman* v. *Wade*; that the Court was bound by that decision; and that the appeal failed.

APPEAL from a judgment of the Divisional Court sitting in Admiralty (Duke P. and Hill J.) (1) affirming a decision of the judge of the county court of Norfolk holden at Great Yarmouth.

The appellants (defendants) were Palgrave, Brown & Son, Ld., timber merchants of Great Yarmouth; the respondents (plaintiffs) were the owners of the steamship *Turid*.

By charterparty dated October 1, 1914, it was agreed that the plaintiffs should load on the *Turid* at Soroka and thence carry for the defendants a cargo of deals, battens, boards

(1) [1920] P. 370.

and short ends to Great Yarmouth as ordered, "always afloat." By clause 3 of the charterparty it was (inter alia) provided that the cargo should be "loaded and discharged . . . . as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports but according to the custom of the respective ports. . . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The *Turid* arrived at Great Yarmouth with the defendants' cargo on November 8, 1914, but was unable on account of her draught to come nearer to the quay than 12 to 13 feet. Under such circumstances the custom of the port was that a wooden staging should be erected between the ship and the quay, and that stevedores employed by the shipbrokers as agents for the shipowners should carry the cargo from the ship's rail over the wooden staging and dump it at not less than 10 feet from the edge of the quay, and that the cost of so discharging the cargo and erecting the staging should be borne by the shipowners. The plaintiffs under protest carried the cargo from alongside over three stagings erected by the defendants opposite the vessel's respective holds and stacked the cargo on the quay, whereby additional expenses were incurred amounting to 46*l.* 17*s.* more than if the plaintiffs' obligation had ceased at the ship's rail.

The plaintiffs claimed to recover this sum from the defendants on the ground that the custom was inconsistent with the express terms of the charterparty which required the defendants to take the cargo "from alongside" at their own risk and expense. The Divisional Court, affirming the decision of the county court judge, held, following the decision of the Court of Appeal in *Holman* v. *Wade* (1), that the custom was inconsistent with the charterparty and that the plaintiffs were entitled to succeed.

The defendants appealed.

MacKinnon K.C. and *Harney K.C.* for the appellants.

Raeburn K.C. and *Trapnell* for the respondents.

(1) "The Times," May 11, 1877.

C. A. 1921

THE TURID.

[Having regard to the fact that the Court held itself bound by the decision of the Court of Appeal in *Holman* v. *Wade* (1) and no decision was given as to what the judgment would have been in the absence of that authority, the arguments, which were the same as in the Court below, are omitted.]

LORD STERNDALE M.R. This is an appeal from the Divisional Court sitting in Admiralty giving judgment in favour of the shipowners in respect of a claim for some expenses incurred in discharging the steamship *Turid*. The ship went to Soroka under a charter by which she was to load a cargo of timber, and being so loaded proceed to Great Yarmouth as ordered, or as near thereunto as she could safely get, and deliver the same afloat. The charter also provided that the cargo was "to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The facts, after the ship arrived at Yarmouth, as stated by the learned President, were as follows: "The draught of the *Turid* was such that to be afloat at Yarmouth, she could not come within about 13 ft. of the quay side at which she was to discharge. The usual method of unloading for a ship so situated is to erect stagings between the ship's side and the edge of the quay, abreast of the several holds, such stagings being constructed of baulks of timber carried from the quay to the ship's side at a level of 4 or 5 ft. below the rail with planks resting upon the baulks. The *Turid* had three holds, and three stagings were erected. At each staging one gang of men carried the timber to the ship's rail, and another gang received it there, carried it ashore, and stacked it at a distance of some 12 ft. from the face of the quay. Stacking of timber nearer the water side was not permitted, as free passage way had to be kept there. The cost in question was the cost of erecting the stagings, carrying the timber across the stagings and across the 10 or 12 ft. of quay, and stacking it. Before the learned judge in the county court proof was given of a custom of the port of Yarmouth that the whole of this work should be done by, and at the cost

(1) "The Times," May 11, 1877.

of, the ship. It was objected, on the part of the shipowners, the plaintiffs, that the alleged custom was inconsistent with the terms of the charterparty, and the learned judge took this view and gave judgment in their favour for the sum in dispute."

In my opinion this case is governed by the decision in *Holman* v. *Wade* (1), and that being so, I do not think it necessary, or indeed advisable, to express any opinion of my own as to what my decision might have been if I had not thought the case to be governed by *Holman* v. *Wade*. (1) The two learned judges in the Divisional Court differed with regard to that matter, the President being of opinion that the custom was inconsistent with the charter, while Hill J. was of opinion that he would have held that it was not inconsistent if he had not been bound by *Holman* v. *Wade*. (1) There is a great deal to be said on both sides, and I do not think it necessary or right to express any opinion upon it.

Holman v. *Wade* (1) is only reported in a most unsatisfactory manner, that is to say, it is only reported as a piece of news in the newspaper. Counsel for the appellants referred to it as an ancient case which had been disinterred from the rest where it had lain so long. It surprised me to find after that, that it was decided in 1877, a date well within the recollection of at any rate one member of the Bench. It is only reported in "The Times" newspaper. Why, I do not know, and I think it is very unsatisfactory to find oneself bound by a case not fully reported, and as to which we have not full and proper knowledge. But the case has been referred to and dealt with in various other cases. I do not think any opinion has been expressed with regard to it in the Court of Appeal here, although it came before the Court of Appeal in Ireland, but it has been cited from time to time in Courts of first instance. It has been followed in a case to which I shall refer directly, and so far as I know, no disapproval of it has ever been expressed. The difficulty about it is to ascertain exactly what it decided. It was a case at Hull, where the shipowners were claiming for the

(1) "The Times," May 11, 1877.

C. A. 1921

THE TURID.

Lord Sterndale M.R.

expense of discharging under circumstances very similar to those of this case. In answer to that claim, the defendants set up a custom which is pleaded in the defence as follows : "It is the customary and recognised mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside, and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof." It is rather curiously expressed, but I think what it means is that when the cargo has been discharged upon the quay, and not until then, it has been discharged alongside, and that the consignees taking it from there are taking it from alongside. It rather appears as though the custom which had been put to the jury was not exactly the custom in the terms there pleaded, because in the Associate's certificate, this appears : "The jury found that according to the terms of the charterparty (apart from the question of usage or custom) the cargo was not to be taken by the shipowner from the ship's rail by means of a stage, supplied by him, to the quay, and there stacked by and at the risk and expense of the shipowner ; that was to be done by and at the risk and expense of the merchants." I rather infer that that was the custom that had been put to the jury, and if so it is not exactly in the terms of the defence. The jury also found "that the alleged usage or custom is proved to their satisfaction." On that Manisty J. entered judgment for the plaintiffs on the ground that the custom was inconsistent with the charterparty, and his decision was affirmed by the Court of Appeal.

Holman v. *Wade* (1) has been cited as a decision upon whether a custom to stack could be a good custom. That, I suppose, means stacking after perfect delivery had taken place, and it was attempted to distinguish this case on that ground. I do not think it is distinguishable on that ground for two reasons : One is that the expense which was sued for in the action, a small sum, was an expense both of stacking and unloading. I was taking the words "stacking and unloading" from the

(1) "The Times," May 11, 1877.

report in "The Times," but it is more accurate to take it from the pleadings: "They were forced to discharge the said cargo and stack the same on the said quay, and thereby incurred expenses amounting to 11*l.*" Now, the whole of that expense was given to the plaintiffs. If it had been stacking alone, of course the expense, small as it was, ought to have been divided, and only the stacking expenses should have been given to the plaintiffs; but I also notice that in the report in "The Times" it is stated that "it is necessary in order to unload deals to have a stage from the quay to the ship, and as the deals are unloaded and the ship, being lightened, rises, it is necessary to raise the stage and it is necessary also as the deals are landed to stack them, and all this involved considerable expense." What I gather from that is that it is not meant that after there had been a complete delivery the merchants were asking the shipowners to stack, in the sense that they wanted them to stack and mark qualities or sizes or anything of that kind, but that in the course of delivery it was necessary to stack, because a lot of timber cannot be thrown loose upon the quay, as it would take up an unnecessary amount of room. The stacking, I think, was considered as part of the putting upon the quay, part of the delivery.

For these reasons I do not think that this case can be distinguished on the ground that it related to stacking only. If it cannot be so distinguished it seems to me to be exactly in point here. It has been acted upon in *The Nifa* (1) in the Admiralty Divisional Court, and whether it be inconsistent with the decision of Bigham J. in *Stephens* v. *Wintringham* (2) or not, is not a matter that it is necessary for us to consider here. I can see points of distinction between that case and this; but whether *Stephens* v. *Wintringham* (2) can be reconciled with *Holman* v. *Wade* (3) or not, in my opinion the decision in the case before us cannot be distinguished from the decision in *Holman* v. *Wade*. (3) Therefore I think the appeal fails and should be dismissed with costs.

(1) [1892] P. 411. (2) (1898) 3 Com. Cas. 169.
(3) "The Times," May 11, 1877.

C. A. 1921

THE TURID.

WARRINGTON L.J. I am of the same opinion. I also think that we are bound by the decision in *Holman* v. *Wade*. (1) It is quite true that the report of *Holman* v. *Wade* is somewhat unsatisfactory, and the rest of the materials for considering that case are afforded only by the record. But this, at all events, is clear both from the report and from the record, that the question between the parties was, who was to pay the expense of the process by which, according to the alleged custom, the cargo was discharged. The shipowner said: "By the terms of the contract, you, the charterers, are to pay the expense of discharging from alongside." The charterers said: "By the custom which we have proved, you, the shipowners, are not only to perform the operation of landing the cargo in the way we say the custom prescribes the landing, but you must pay the expense of it." The ultimate decision was that at any rate that part of the custom which was said to throw the expense upon the shipowner was inconsistent with the terms of the contract, which provided that that cargo should be taken from alongside the ship at the risk and expense of the charterer. The custom may well be held to regulate the mode of discharge according to the express terms of the contract; but the payment of the expense is an absolute obligation thrown by the contract upon the charterer, and not, therefore, capable of being varied by any such custom as alleged in the present case. For the reasons given by the Master of the Rolls, I think we are bound by *Holman* v. *Wade* (1), and therefore so far as we are concerned, there is an end of the matter.

SCRUTTON L.J. I have felt considerable doubt and difficulty as to whether we know enough about *Holman* v. *Wade* to be bound by it, as we should of course be bound by it, as a decision of the Court of Appeal, if we clearly knew what it decided. I have felt the more doubt and difficulty, because although it is not proper that I should express a final opinion if we are bound by the decision in *Holman* v. *Wade* (1), I think, as at present advised, that in the absence of *Holman* v.

(1) "The Times," May 11, 1877.

Wade (1) I should have taken the same view as Hill J. would have taken but for that case. I think I should have treated the custom alleged in this case, as was said by Lord Esher in *Aktieselkab Helios* v. *Ekman & Co.* (2), as simply explaining what the delivery of the cargo to the consignee alongside is and how it is to be effected. I think I should have taken the same view of that case as Bigham J. took in his working out of it in *Stephens* v. *Wintringham* (3), as applicable to the Port of Hull. But we have certain materials upon which we can judge of what *Holman* v. *Wade* (1) decided. We have the record and the formal judgment, and we have a short report of the case in " The Times " newspaper. It appears from the record that the shipowners alleged that the ship came to Hull; that the charterers did not and would not take the said cargo from alongside the ship at their own risk and expense; and that the shipowners were forced to discharge the cargo and stack it on the quay, and incurred expenses amounting to 11*l.* The charterers replied by alleging a custom in the mode of discharging at Victoria Docks, whereby ships discharge their cargo upon the quay alongside and continue the discharge as long as there is quay space vacant for the discharge thereof. The shipowners replied that the alleged custom was contradictory of the charterparty. For some reason which I do not at present understand, Manisty J. left to a common jury what the charter meant, and it appears from the terms of their answer that something further than was pleaded had been alleged as the custom. They found that the cargo was not to be taken by the shipowners from the ship's rail by means of a staging supplied by them to the quay and there stacked at their risk and expense; but they also found the alleged usage or custom was proved in fact to their satisfaction. The judge however entered judgment for the plaintiffs, the shipowners, for the whole amount claimed on the ground that the custom was inconsistent with the charterparty, and the Court of Appeal upheld his decision. It is not quite clear what construction the Court put upon

(1) " The Times," May 11, 1877.

(2) [1897] 2 Q. B. 83 [*qu.* should read " Aktieselskab."].

(3) 3 Com. Cas. 169.

C. A. 1921

THE TURID.

Scrutton L.J.

the charterparty. There have been judges who have said that "alongside" means at the ship's rail. There have been judges who have said that "alongside" means within reach of the consignee, hanging on to the ship's tackle. There have been judges who have said it means deposited on the quay, and deposited not haphazard but in some sort of order. Whichever construction the Court took, it seems to me that they included in the 11*l.* which they gave to the ship something more than mere stacking; they included what they called discharging or unloading, which I think must mean a certain amount of carriage over the quay, and whichever custom it was that the jury found, whether it was the custom as pleaded, or whether it was the custom of erecting a stage and stacking, which is not the custom pleaded, it must have been held to be inconsistent with one of the constructions of the charter which I have put forward. That being so, there being, so far as I can see, no subsequent decision of this Court inconsistent with that finding, although some parts of the judgments in *Aktieselkab Helios* v. *Ekman & Co.* (1) in my view go very near it, whatever I may think I might have found if I had been sitting in the Court at that time, it appears to me that I am bound by that decision of the Court of Appeal, and that it would not be dignified or proper for me to argue against the correctness of that decision. If it is to be reversed—and it may be a case of sufficient importance as affecting other ports to take it to the House of Lords—it is for the House of Lords to say whether they think *Holman* v. *Wade* (2) was rightly decided, and not for me.

For that reason, coming to the decision as I say with considerable doubt, I think I am bound by *Holman* v. *Wade* (2) and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Trinder, Capron & Co.*
Solicitors for the respondents: *Botterell & Roche.*

(1) [1897] 2 Q. B. 83.

(2) "The Times," May 11, 1877.

E. C. M. T.

ADMIRALTY.

1921
Jan. 19.

(In Prize.)

THE BLONDE and Other Ships.

Prize Court—Ships owned by Dantzig Corporation—Seizure on Outbreak of War—Treaty of Versailles, 1920, *Part III., s. XI., arts.* 100–109; *Part X., s. IV., art.* 297—*Condemnation.*

Three ships owned by a Dantzig corporation which were in British ports on the outbreak of war with Germany were seized as prize. Subsequently they were detained under orders of the Prize Court under "*The Chile*" order [1914] P. 212.

By Part III., s. XI., arts. 100–109, of the Treaty of Versailles the City of Dantzig was constituted a Free State and was not subjected to any of the Allied or Associated Powers. By Part X., s. IV., art. 297 (*b*), the Allied and Associated Powers reserved "the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present treaty to German nationals . . . . within their territories . . . . including territories ceded to them by the present Treaty," but "German nationals who acquire ipso facto the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals . . . . ":—

Held, that the Treaty left the citizens of Dantzig in the same position, so far as their property, rights and interests were concerned, as if they had remained German subjects; that certain negotiations between Great Britain and Germany in August–September, 1914, as to the ultimate treatment of detained enemy vessels did not constitute a binding agreement; and that as in the absence of agreement to the contrary merchant ships of a belligerent found in an enemy port at the outbreak of hostilities are subject to condemnation (*The Marie Leonhardt*, ante, p. 1) the ships must be condemned.

Applications for the condemnation of three steamships registered in the Port of Dantzig and seized in British ports on the outbreak of war in August, 1914.

The three vessels in question, the *Blonde*, the *Hercules* and the *Prosper*, were owned by the Dantziger Rhederei Aktiengesellschaft of Dantzig. Appearances were entered on their behalf, and affidavits were filed in support of the appearances. When the cases came before the President, Sir Samuel Evans, in September, 1914, and January, 1915, he struck out the appearances on the ground that the affidavits were defective

1921

THE BLONDE.

and in each case ordered the ships to be detained until further order under "*The Chile*" order (1) with liberty to apply. Orders were subsequently made giving the Admiralty leave to requisition the ships temporarily without appraisement. The *Blonde* was lost by stranding, the *Hercules* was sunk by enemy action while under requisition, and the *Prosper* was still afloat. After the conclusion of peace the Dantzig owners entered fresh appearances and filed claims asking for restoration of the *Prosper* with compensation for her use and compensation in respect of the loss of the other two ships.

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Wylie* for the Procurator-General. These cases are governed by the decision in *The Marie Leonhardt* (2) and the same considerations apply. Part XI., arts. 100–109, of the Treaty of Versailles do not affect the Crown's right to condemnation. The subject-matter is not property which was situated within the City of Dantzig. These ships at all material times belonged to German subjects. The diplomatic correspondence between Great Britain and Germany did not ripen into an agreement, and Germany by the instructions issued to her consular authorities in October, 1915, showed that she did not regard the correspondence which had taken place in August and September, 1914, as constituting an agreement. On October 10, 1915, the German Government instructed its consuls in Spain that German vessels requisitioned by the British Government should, if brought into Spanish harbours, be detained with a view of obtaining their release from British control at the hands of the neutral Power. Those instructions are quite inconsistent with the contention that in September, 1914, the British Government had acquired by agreement the right to requisition ships by paying for their use. Apart from agreement, enemy vessels found in belligerent ports on the outbreak of war are subject to condemnation: *The Marie Leonhardt* (2); and until the Treaty of Peace, when all German subjects became in amity with Great Britain, the citizens of Dantzig, in common with

(1) [1914] P. 212. (2) Ante, p. 1.

1921

THE BLONDE.

all other German subjects, were enemies, their property was enemy property and as such liable to condemnation.

Balloch for the claimants. In September, 1914, a definite agreement was come to between the British and German Governments as to the treatment of detained merchant ships at the end of the war. The Sixth Hague Convention afforded a basis for negotiation, and the agreement was that the ships should be restored, or, if requisitioned and not restored, that compensation should be paid. [The correspondence relied on as constituting an agreement is sufficiently set out in the judgment.] The method and time of payment, as to which the two Governments were not agreed, did not prevent an agreement on the main point; they were mere matters of machinery. The instructions sent out to the German consuls in October, 1915, are not inconsistent with the alleged agreement; the requisitioned ships became in effect British ships and liable to capture. The inconsistency is in the application for leave to requisition if in fact the Crown had the right to condemn. If it be argued that, even assuming an agreement was come to, the conduct of Germany showed that she did not intend to abide by it, the contention if sound as against German nationals cannot be put forward as against citizens of Dantzig who lost their German nationality at the same moment that the Treaty of Peace became operative. The Prize Court does not exist to take belligerent action by way of reprisal; it cannot say that because there has been a breach of international law or treaty obligations the rights of belligerents are at an end: *The Nereide* (1); retaliation is a political and not a legal measure. It is not suggested that the Treaty of Peace in this connection affects the claimants, except that as citizens of Dantzig they are no longer German nationals and should not be blamed for the atrocities committed by German nationals. Their property is no longer German property and ought not to be confiscated in order to pay the debts of Germany from whose yoke the City of Dantzig has been freed. The claimants are entitled to the release of

(1) (1815) 9 Cranch, 388.

1921

THE BLONDE.

the *Prosper*, an indemnity for the other two vessels lost, and compensation for the user of the vessels.

Sir Ernest Pollock S.-G. in reply. It is clear from a perusal of the diplomatic correspondence relied on as constituting an agreement as to the treatment of detained enemy vessels that Germany was insisting on payment for the user of such vessels immediately and not at the end of the war. The British Foreign Office never accepted the German terms and no agreement was come to. The case therefore is indistinguishable from *The Marie Leonhardt* (1); at the date of seizure and at the date of the writs the claimants were enemies, their property was liable to condemnation, and they could not thereafter make a valid transfer of it. As to the position of enemy property upon the surrender of territory see *The Danckebaar Africaan* (2); see also the recent decision of the Privy Council in *The Hilding* (3) and the cases there cited. The clauses of the Peace Treaty relating to Dantzig have no bearing on the question of the fate of these vessels and they fall to be dealt with under art. 297 (*b*) of the Treaty, which reserves to the Allied and Associated Powers the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals within "territories ceded to them by the present Treaty"—territories which included the free city of Dantzig; and the citizens of Dantzig are not within the exception of the proviso "German nationals who acquire ipso facto the nationality of an Allied or Associated Power . . . . will not be considered as German nationals. . . . ." Their property in this country is therefore subject to condemnation.

SIR HENRY DUKE P. The three vessels which are in question here—the *Blonde*, the *Hercules* and the *Prosper*—are vessels of no very considerable tonnage which were seized in ports of Great Britain upon the outbreak of the war. The *Blonde* was a vessel of 613 tons gross, the

(1) Ante, p. 1. (2) (1798) 1 C. Rob. 107.
(3) [1921] 1 A. C. 518

1921

THE BLONDE.

The President.

Prosper a vessel of 759 tons gross, the *Hercules* a vessel of 1095 tons gross. At the time of seizure they were the property of a German corporation which had its business seat in the Port of Dantzig, and they were registered in the Port of Dantzig, and necessarily were vessels under the German flag. As is admitted, they were, for all the purposes relative to the consideration of a question of prize in this Court, German ships. The vessels have met with varying fates. One has been lost at sea by stranding, one has been sunk by the enemy when she was in use under requisition, and one of them is still afloat in the employment of persons who hold her under an order of this Court for requisition. As to the vessel which is afloat, there is on the part of the claimants—the corporation I have mentioned, who remain in the City of Dantzig—a claim for the restoration of that ship. The same claimants claim with regard to the other two ships their value; and, so far as any one of the three ships has been applied to profitable uses under process of requisition during the war, the ascertainment and payment of a reasonable reward for such use.

Various questions of much interest and of very considerable importance have been raised in the argument of the case, and the arguments have not been much restricted in scope by reason of the fact that some time since, in a judgment which was delivered immediately after the vacation, the Court determined the fate of one German vessel seized at the outset of war in like manner with the vessels which are here in question, and determined that a vessel so seized, in the circumstances in which that vessel was seized, must be held to be good and lawful prize. That was the decision in *The Marie Leonhardt.* (1) This case has proceeded upon lines to which, so far as I need refer to them, the judgment in *The Marie Leonhardt* (1) does not relate. In the first place, the claimants for *The Marie Leonhardt* were German subjects at the time of the claim. They had been German subjects at the time of the seizure. They remained within the German State at all material times. In the present case, on the

(1) Ante, p. 1.

1921

THE BLONDE.

The President.

contrary, the claimants are a corporation situate at Dantzig. They have become, as they properly state in their affidavits, the citizens of a Free City, and they claim to have considered, with regard to their three ships, the question whether upon the transfer of the territory of Dantzig, and the allegiance of the citizens of Dantzig, from the German State to a new State created by the Treaty of Peace, rights accrued to the present claimants which differentiate their position favourably from the position in which the claimants stood against whom judgment of condemnation was given in *The Marie Leonhardt*. (1) They desired also to have the decision of the Court upon certain questions which the claimants in *The Marie Leonhardt* (1) elected not to argue.

In the claim of the Crown for condemnation of the *Marie Leonhardt* three propositions were advanced for the Procurator-General. One was that by the ancient law of prize enemy vessels seized in the port of a belligerent at the outbreak of war and not made subsequently the subject of convention for release are subject to condemnation as prize. The second was that although this country had been ready to enter into terms with the German Empire such as are set forth in Convention VI. of the Hague Conventions, no convention had been effectually concluded between His Majesty's Government and the Government of the German Empire which rendered the terms of Convention VI. operative in favour of the owners of the *Marie Leonhardt*. The third question upon which the Crown submitted there should be judgment against the then claimants was the question which arose with regard to an alleged agreement through diplomatic agencies during the war, an agreement subsequent to the Hague Convention but with regard to the provisions of the Hague Convention. The Crown submitted that, owing to conduct of deliberate inhumanity and the repudiation of all the obligations of international law on the part of the late Government of the German State, the citizens of the German State had been deprived of any right to set up against citizens of the allied States, or against the allied States

(1) Ante, p. 1.

themselves, any rights which, without such conduct, might be deemed to have accrued to them by convention or by prize law.

The questions as to nationality of claimants, and as to the effect of the Treaty of Peace upon the property of German subjects, and upon the property of subjects whose allegiance was transferred by the Treaty of Peace from Germany to some other State, did not arise in *The Marie Leonhardt*. (1)

Counsel for the claimants in *The Marie Leonhardt* elected to treat the Sixth Hague Convention and the diplomatic correspondence which took place through neutral agencies in the autumn of 1914, between His Majesty's Government and the then Government of Germany, as not affording any ground of claim to the owners of the *Marie Leonhardt*. Having regard to the course then taken the only question which was before the Court for decision in *The Marie Leonhardt* (1) was the question of whether by what one may call the common law of prize (that is the law of prize which depends on immemorial or universal usage) there was in 1914 the right on the part of owners of an enemy vessel, if it was in the port of a belligerent at the outbreak of war, to have a reasonable period for withdrawal. I came to the conclusion that there was no such right—that the law as it was expounded by Lord Mansfield in the well-known case of *Lindo* v. *Rodney* (2) is still the law of prize in this country, and that failing some agreement upon reciprocal terms on the part of the belligerents concerned, vessels found in port, and seized in port in this country, being the property of an enemy subject at the time, were subject, during the war, or at the close of the war, to be condemned as prize. No question has been raised with regard to that decision in *The Marie Leonhardt* (1), so I propose to say nothing more on that matter. The questions that have been raised are the other questions to which I have referred.

I allude now, first, to the contention which Mr. Balloch has advanced that by virtue of the Treaty of Peace citizens of the State of Dantzig are exempt from those consequences

(1) Ante, p. 1. (2) (1782) 2 Doug. 612n.

1921

THE BLONDE.

The President.

of prize law, and of liability to condemnation in prize, which the rules of international law and the provisions of the Treaty of Peace brought about with regard to the citizens of Germany as a body. Mr. Balloch contended that the Court should differentiate the case of the citizens of Dantzig from the case of German nationals who after the Treaty of Peace had come into operation remained German subjects. I have to consider that contention first of all with regard to international law, apart from the Treaty of Peace, and secondly with regard to the state of affairs resulting from the Treaty of Peace. As a consequence of the victory of the Allied and Associated Powers in the war, the territory which is now the territory of the Free City of Dantzig was surrendered by the German State to the collective body described as the Allied and Associated Powers. It ceased to be German territory, and it ceased to be German territory upon the terms that the Allied and Associated Powers would proceed to erect the community who were the occupants of that territory into a free and independent community, having its own international status.

Mr. Balloch said, and, as it seemed to me, with some natural force, it might be the Treaty would involve a hardship upon the German citizens who were so erected into a new community, if they were held bound by the penal obligations which the Treaty, as a whole, imposed upon the subjects of the late German Empire. That is a matter which might be fairly raised in argument, but looking at the question as a question of international law, apart from any express provisions of the Treaty, I find it difficult to discover any point of time at which the condition of the citizens of Dantzig can be differentiated from the condition of the general body of the citizens of Germany so as to vest in the State of Dantzig any property of which, by reason of the results of the war, they had become divested. The state of the case, apart from particular provisions in the Treaty, was this, that during the war German citizens residing in Dantzig had been lawfully deprived of certain movable property of theirs—namely, steamships, which had been found in the ports of Great Britain under such conditions that unless during the

1921

THE BLONDE.

The President.

war the rulers of the German State came to terms with the Government of Great Britain as to those ships, those ships were subject to condemnation. During the war no terms were made with regard to those ships and they at all points of time during the war were, applying as I must the judgment in *The Marie Leonhardt* (1), subject to condemnation. I have to consider the fact that the transfer of the allegiance of the citizens of Dantzig was made by the Treaty, and came into existence notionally the moment after the conclusion of the war, that is upon the conclusion of the war. Can it be said there was then revested in the citizens of Dantzig any property of which in the course of the war they had been deprived? I have not been able to discover any grounds upon which, apart from any express agreement, it can be said that those citizens would have rights which other German citizens would not have immediately upon the conclusion of the war. Immediately upon the ratification of the Treaty of Peace the citizens of Germany were in amity with this country, and immediately on the operation of the Treaty of Peace the citizens of the Free City of Dantzig were in amity with this country. They were in each instance the subjects of foreign friendly Powers. I cannot find any ground upon which I could admit the citizens of Dantzig, apart from express provision in the Treaty, to have acquired rights in these ships without setting up the proposition that citizens of Germany (except so far as they were expressly divested by Treaty) acquired by the conclusion of peace similar rights. It may be that I have overlooked some consideration to which I ought to have regard, but at any rate no ground was pointed out to me upon which it could be said that the citizens of Dantzig, apart from the Treaty, were put into a privileged position, as compared with the general body of the former citizens of the German State. In the absence of authority—no authority was submitted to sustain the proposition, and my own recollection of the authorities is on the whole adverse to the proposition—and in the absence of any argument founded upon reason,

(1) Ante, p. 1.

1921

THE BLONDE.

The President.

upon which I could come to the conclusion that under the ordinary law of prize, that is by usage, the citizens of Dantzig were privileged to recover these ships, although the citizens in other parts of Germany would not have been, I come to the conclusion that, apart from any express term in the Treaty, the claimants are in no better position than were the owners of the *Marie Leonhardt.* (1)

I have to consider then what the case is with regard to the clauses of the Treaty. Certain clauses were read to me. The relevant clauses are those in Part III., s. XI., of the Treaty, which deal with the constitution of the Free State of Dantzig. I have looked through them as a body, and it seems to me (not pronouncing a concluded opinion in the matter in case it should arise in any other cause) that the general effect of s. XI. is to constitute a new Sovereign Power—namely, a free city, such as was exceedingly well known during some hundreds of years in the history of Europe. The territory is defined, provision is made for the adoption of a constitution under which the citizens of that territory are to live, and provision is made for the international recognition of the Sovereign character of the new State so constituted. By art. 104 the principal Allied and Associated Powers undertook to negotiate a treaty between the Polish Government and the Free State of Dantzig with regard to certain matters. So that there is constituted the Free State of Dantzig; it is separated from the German State, and is not subjected to any of the Allied and Associated Powers. That last conclusion seems to me to be a material one, because, when I come to Part X., s. IV., of the Treaty, which deals with property, rights, and interests, I find in art. 297 (*b*) a provision which deals with private property and German nationals throughout the German State: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right"—reserve the right—so that the right is asserted to have existed at the making of the Treaty, and it is declared to be "reserved"—"to retain and liquidate"—that is, to

(1) Ante, p. 1.

1921

THE BLONDE.

The President.

hold and dispose of—"all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the present Treaty. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State." So that the property of the German nationals within the territory of the Free State of Dantzig—which is a territory ceded to the Allied and Associated Powers by the Treaty—is retained to, and is to be liquidated by, the Allied or Associated States in accordance with their laws. There is a proviso at the end of sub-s. (*b*) to this effect: "German nationals who acquire ipso facto the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph." The article includes the German nationals within the Free State of Dantzig in its general operative words, and they are not within the excepting words of the proviso, because they are not German nationals who acquire ipso facto the nationality of an Allied or Associated Power by the terms of the Treaty. That being so, it appears to me that—international law without the Treaty not creating any privilege in the citizens of Dantzig in respect of the matters here under consideration—the Treaty itself shows that it was the intention of the contracting parties upon the conclusion of the Treaty to leave the citizens of Dantzig in the same position internationally as were the citizens of Germany as a whole, that is, to leave them subject to the right of the Allied and Associated Powers to retain and liquidate their property, rights, and interest—to deal with them in fact (so far as international law was concerned) as though they had been German subjects and were remaining German subjects.

I come to the conclusion upon this part of the case that under international law without the Treaty, and under the

1921

THE BLONDE.

The President.

Treaty, the claimants in the present set of claims are in no better position than were the claimants in *The Marie Leonhardt.* (1)

Now as to any convention or compact. It is not contended on the part of the claimants that they derive a right to these ships from the Hague Convention No. VI. What is said is that in the course of the period which elapsed between the declaration of war and the end of October, 1914, His Majesty's Government concluded an agreement with the then Government of the Empire of Germany whereby enemy ships seized in port at the outbreak of war in this country were agreed to be delivered up to their German owners when the war should cease, with compensation at some rate for the use of the ships during the war. That has been the main subject of discussion upon the argument. Other questions have been considered, but not in the same detail. It is said on the part of the Crown that if (which was denied) there were any agreement with regard to the property in these ships—any reservation of right in these ships—in favour of German subjects which left them in a more favourable position than they would have been in at international law without such agreement, the agreement was subject to a condition that the German State should give benefits corresponding to the benefits it claimed. It was said further for the Crown that if there had been such an agreement by correspondence through diplomatic channels during the war, as was alleged by the claimants, the German Government had shown by its conduct at an early stage in the war, and consistently afterwards, that it repudiated that agreement. Some reference was also made to a matter which was seriously raised in *The Marie Leonhardt* (1), and which was seriously raised here—namely, that by reason of the acts of inhuman atrocity perpetrated under the authority of the Imperial German Government during the war, citizens of Germany were outside the protection of international law, and could not be heard to make claims to the benefits of international law in matters where their rulers repudiated the obligations of

(1) Ante, p. 1.

1921

THE BLONDE.

The President.

international law. That last-mentioned subject was not necessary for determination in *The Marie Leonhardt* (1), nor do I think that it is necessary for determination in this case. When it comes up to be judicially determined, if it ever should, the observations of Marshall C.J. and Johnson J. in *The Nereide* (2), to which Mr. Balloch referred, will, I doubt not, receive the consideration to which they are entitled by reason of the great eminence of the authorities from whom they proceeded and the tremendous gravity of the principles which those learned judges enunciated. I say no more on that topic. I am glad to be at liberty to deal with this case upon much narrower grounds.

I have to ascertain, first of all, whether there was an agreement, and whether, if there was an agreement, it was a term of it that Germany should get as she gave. A very elementary principle of law which originated before English law was formulated is embodied in the very simple formula Do ut des, and that was, in substance, the formula to which the Crown resorted in the argument of the question which has been considered here. On general grounds it seems very sound, though it may be defeated in some cases. It may be conceivable that with a clearly concluded agreement flagrant departure on the part of one of the parties from the terms of the agreement might operate to effect a rescission and renunciation of his rights under the agreement. I do not think that question arises in this case. I have to ascertain from the terms of the correspondence here whether, in fact, there was such an agreement as is alleged, and if so, what it was. The correspondence was a correspondence which was conducted through various neutral agencies in neutral countries, and, ultimately, through the Department of State at Washington by the agency of the American Ambassador in London. It was correspondence which related to the whole subject of the treatment by the respective belligerents of enemy ships, their cargoes and their crews, and it was based upon the efforts which had been made at the Hague Conferences to arrive at a convention on such subjects. It is

(1) Ante, p. 1. (2) 9 Cranch, 388.

1921

THE BLONDE

The President.

only in that respect, for the purpose of furnishing a sort of glossary for the interpretation of the language of the correspondence, that the Hague Convention No. VI. is material here. It is not suggested that that Convention was concluded so as to confer upon these claimants the rights which are asserted on their behalf. The correspondence deals with the three matters to which I have referred—ships, cargoes, crews. By the ordinary law of prize—the old law of prize—it was recognized, as it seems to me, that ships were subject to detention and condemnation as prize, or, at any rate, that that was a possible, if not probable, view of the law of nations as it then stood ; that cargoes were subject to be dealt with in the same way ; and that crews might be interned and treated as prisoners of the enemy State, at the mercy of their captors, subject to such humane restrictions as international law might impose. Those were the topics to which this correspondence related. It begins quite early in August, 1914, and from time to time during August and during September the German Government on the one hand, and His Majesty's Foreign Office on the other, stated what they were willing to do. Language is used in some communications which treats particular matters as though they were concluded matters, that is, it is language which is capable of that construction. There is the phrase, for instance, that "His Majesty's Government will do," this or that. There is the phrase that "the Imperial Government agrees, or is ready to do," such and such things. To determine the true construction the whole correspondence must be looked at. That, I think, is as sound a principle in questions of international convention as it is in relation to questions with reference to agreements of individuals. Now, there being correspondence of that kind on these matters during August, at the end of August the Secretary of State at the Foreign Office lays great emphasis upon the fact that whatever His Majesty's Government is ready to do it will be only upon the terms that the German Government shall be ready to do the same things. That is material upon both questions—whether there was a concluded agreement—and, if so, what that

1921

THE BLONDE.

The President.

agreement was. On August 25 the American Ambassador submitted to the Foreign Office a message received from the German Ambassador at Berlin. In that message the German Government desired to be informed whether, if the British Government rejected the proposals of the German Government which had then been under consideration, they would confiscate all German ships which had been seized, without compensation, or whether, in accordance with certain provisions of the Hague Convention No. VI. they would hand back the ships and their cargoes at the end of the war; or, in case they requisitioned them, would at once give compensation. They desired also to know whether the British Government were prepared to liberate the crews of interned German vessels, and stated what the German Government was ready to do with regard to the crews of interned British vessels. Sir Edward Grey, His Majesty's Secretary of State, replied to that communication. He referred to the Hague Convention, by which he said the procedure of His Majesty's Government was governed, and then proceeded as follows: "As stated in my note of the 14th ultimo, His Majesty's Government will grant to German ships the benefits of arts. 2, 4 (first paragraph), and 5 of the Convention, but not those accorded by arts. 3 and 4 (paragraph 2) to which Germany is not a party. The decisions of the Prize Court in such cases will proceed upon this basis." First of all with regard to the forecast in this letter of the decision of the Prize Court I make this observation on reading that phrase, that it was impossible that any minister should declare, in advance, what would be the decision of a Court which is a Court of law, and that the employment of that phrase was no more than a forecast which might prove to be right or wrong. It was only the more likely to be right in that the person from whom it proceeded was a person of eminence with means at his command of being properly advised upon the subject. It was nevertheless a declaration which did not bind the Prize Court. With regard to the other part of the matter, which is the material part here, I say only this, that when the Secretary of State says His Majesty's Government will grant

1921

THE BLONDE.

The President.

to German subjects certain benefits, he is not making an actual grant of benefits but declaring what is the attitude of His Majesty's Government towards the proposals of the German Government, and stating the readiness of His Majesty's Government to include certain terms in any agreement they may make. That letter, I think, is not relied upon as evidence of a concluded agreement. There is a subsequent communication on September 2, 1914, in which the German Government sets forth again its demand for release at the close of the war of detained ships, with compensation during the war—" de suite " is the expression employed—for the use of requisitioned ships, and its proposals as to the treatment of crews of interned ships, and the writer goes on to say that those terms being conceded the German Government will adopt in this matter a similar process to that for which it has asked. There is an answer to that letter on September 20, from the Foreign Office in London. In that reply the Secretary of State accepts generally " the interpretation placed by the German Government on my two notes of the 14th ultimo," and the letter further points out that the demand for payment, pending the war, is not a demand which is well founded on any proper construction of the Hague Convention, and requests that the German Government may be so informed. When the case for the claimants was opened that document of September 20 was relied upon as evidence of a concluded agreement. I take the view that it shows only a step in the negotiations. It is a step by which the Foreign Office made clear the position of His Majesty's Government with regard to one particular topic among the several questions which were under discussion. The negotiation was carried on to September 24, and it was owing to the observations which the Attorney-General made upon the suggestion that there was an agreement concluded before that time that this letter came to be considered. The German Government stated on September 24 its appreciation of the proposals of the British Government as they then stood. The passage reads: " German Government understands that British Government . . . . will retain ships and

1921

THE BLONDE.

The President.

will compensate the owners thereof." The main contention in the major part of Mr. Balloch's argument with regard to the alleged agreement was that the passage I have summarised in the despatch of September 24 was an acceptance by the German Government of a separate proposal of the British Government with regard to the detained ships. I cannot take that view. I read the whole of that letter, and I see that the question of compensation is still the subject of discussion. More than that, I see that the German Government is demanding to be informed as to what will be the course of the British Government with regard to the crews of interned ships. The letter concludes with a passage which seems to me to be very material to the matter in question as to whether the passage to which I have referred is proof of a concluded agreement. The despatch ends with these words: "German Government assume as a matter of course, that the above understanding should apply to merchant ships in the ports of the Colonies of the two countries as well as of those in the ports of the Mother Country." That is the end of that message, but the sender of it, Mr. Bryan, Secretary of State at Washington, adds this, "communicate substance of this telegram to British Government." It seems to me that that was not a communication which closed the discussion with regard to the ships, and left the other matters to be dealt with separately. This appears to be shown also by a German telegraphic message of September 24 which, at a later date, was communicated by the Ambassador at Washington. It appears further by some subsequent events. The date of the communication to which I have just referred is September 24, 1914. That is the date at which it was forwarded from Washington. Now it is said there was a concluded agreement at that time. On October 10, 1915, however, the German Imperial Government was giving instructions to its representatives in various foreign capitals, including, among others, its representative at Madrid, and it sent out instructions to the German Embassy at Madrid, that German vessels in use by the British Government, in process of requisition without condemnation, might be

1921

THE BLONDE.

The President.

detained and brought into the Courts of neutral countries, for the purpose of release from British control. The Attorney-General points out that that communication is directly in conflict with any suggestion that the British Government had acquired, by agreement, the right to requisition ships paying for their use. The Attorney-General said, and, as it seemed to me, said with much force, that that is to be treated as an honest message, and that, treated as an honest message, it demonstrates that the German Government, in 1915, did not suppose that in 1914 there had been a concluded agreement to the effect of that which is relied upon by the present claimants. I should have come to the conclusion upon the correspondence, as it stood, that it showed only an interrupted negotiation—that it did not show a concluded agreement. With regard to a particular matter the parties were ad idem, but with regard to other questions which were the subject of the one negotiation they were at issue, and their differences never were concluded. But, if I were able to give greater weight than I can to the arguments which Mr. Balloch has advanced as to the possible meaning of the terms to which he referred in the correspondence which took place in the autumn of 1914, so as to found a possible claim by the present claimants on what they allege to be the construction of the documents, it seems to me that the despatch of October, 1915, puts an end to any possibility that it could be contended that there was in October, 1914, the concluded agreement which is now set up.

For various reasons, which I have mentioned at greater length than I had expected would be necessary, I have come to the conclusion that these three ships were good and lawful prize, and must be condemned. Accordingly they are condemned as good and lawful prize, and as droits of His Majesty in His Office of Admiralty.

Solicitors for the claimants : *Botterell & Roche.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. M. T.

BEFORE THE NAVAL PRIZE TRIBUNAL.

(In Prize.)

1921
Jan. 17 ;
Feb. 8.

THE OSCAR II. ; THE BERNISSE ; THE ELVE.

Prize—Naval Prize Fund—Charges upon the Fund—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30), *Sch., Part II., para.* 5.

Under para. 5 of Part II. of the schedule to the Naval Prize Act, 1918, charges on the Naval Prize Fund include "any other costs, charges, expenses and claims which the Tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by prize courts, as being costs, charges, and claims which, had there been a grant of prize to captors, captors would have been liable to pay."

The *Oscar II.*, a neutral vessel laden with a cargo of coffee, was sunk through a collision with a British cruiser while the cruiser was engaged in effecting the capture of the vessel and her cargo as prize. The collision was solely due to the negligence of the officer in command of the cruiser. The owners of a parcel of the lost coffee brought an action against the Procurator-General and recovered damages.

The *Bernisse* and the *Elve* were two neutral vessels bound from a French Colonial port to Rotterdam which were stopped by a British cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels were sent in for examination to Kirkwall on the ground that they had not got certain clearance papers which were given to vessels which had called at a British port. When in the submarine area one of the vessels was sunk by a German submarine and the other was damaged. Their owners recovered damages from the Procurator-General on the ground that having come from a French port with proper documents it was a mistake to send the vessels to Kirkwall :—

Held, that in each case the damages constituted a charge upon the Naval Prize Fund and not upon the Exchequer.

In these test cases the Exchequer sought to establish that the liability to neutral claimants for damages resulting from loss occasioned by the negligence or mistake of prize officers fell, under para. 5 of Part II. of the schedule to the Naval Prize Act, 1918, on the prize fund and not on the Exchequer.

In *The Oscar II.* the owners of a parcel of coffee laden on board that vessel had recovered judgment against the Procurator-General for the amount of the damage sustained through the loss of the coffee owing to the negligence of the officer in charge of one of His Majesty's cruisers which, while

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

engaged in effecting the capture of the *Oscar II.*, came into collision with her and sank her.

In *The Bernisse* and *The Elve* the owners of two neutral vessels bound from a French Colonial port to Rotterdam recovered judgment against the Procurator-General for the damages occasioned by the vessels being torpedoed by German submarines when passing through the submarine area to Kirkwall for examination. The vessels were unjustifiably diverted to Kirkwall by order of the Admiral commanding the station, who was acting under a misapprehension of the effect of an Order in Council of February 16, 1917. (1)

The facts in each case sufficiently appear from the judgment and will be found in fuller detail in the reports of the proceedings in the Prize Court (2) and, on appeal, in the Privy Council. (3)

Sir Gordon Hewart A.-G. and *Wylie* for the Exchequer. These cases fall into two classes: (*a*) where the claim for damages arises from the negligence of the actual captor: *The Oscar II.*; (*b*) where it arises from action taken in execution of the general policy of the Government: *The Bernisse* and *The Elve.* It is submitted, however, that there is no distinction to be drawn between the two classes of cases. Under the former practice in either case it was necessary for the aggrieved owner of the ship or cargo to bring his action against the naval officer personally, for the distinction between personal negligence and mistaken Government policy is a domestic matter with which a neutral claimant is not concerned; the captor was personally liable: see *The Mentor* (4); *The Ostsee* (5); *The Leucade* (6); *The*

(1) By clause 1 of this Order in Council, adopting further reprisals against the unlawful acts of Germany, "a vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court."

(2) [1919] P. 171; [1920] P. 1.

(3) [1920] A. C. 748; [1921] 1 A. C. 458.

(4) (1799) 1 C. Rob. 179.

(5) (1855) 9 Moo. P. C. 150.

(6) (1855) Spinks, 217.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

Acteon (1); and *Der Mohr*. (2) Although the effect of the decisions in *The Zamora* (3) and *The Oscar II.* (4) is to enable a neutral who claims damages for an unlawful act to institute proceedings against the Procurator-General, at the present time, as in the past, a neutral claimant can still obtain judgment against the wrongdoer without regard to the question whether the act was committed upon express instructions or as part of the policy of the Government; for a servant of the Crown is responsible in law for a tortious act, although done by the authority of the Crown: *Raleigh* v. *Goschen*. (5) The principle laid down in *Buron* v. *Denman* (6), that ratification by the Crown of the wrongful act of one of the Crown's servants is equivalent to an act of State, can only be pleaded in a municipal Court, it has no application to prize proceedings, otherwise the principles of international law would be stultified.

In *The Oscar II.* the loss was directly caused by the negligence of the officer in charge of the capturing vessel. In *The Bernisse* and *The Elve* it was due to a misapprehension by the Admiral in charge of the squadron as to the effect of the regulations which it was his duty to enforce. In either case under the old practice the captor would have been liable. No doubt the legal liability of captors greatly exceeded the amounts which they actually paid, owing to the grants in aid made by the Exchequer, but these grants were in the nature of ex gratia payments and did not affect the liability of the captor to pay in full. The charges upon the Naval Prize Fund include "claims . . . . which . . . . captors would have been liable to pay," and the damages in *The Bernisse* and *The Elve* as well as in *The Oscar II.* fall within that category.

Sir Reginald Acland K.C. and *Darby* for the Fleet. The same considerations should apply to the assessment of the liability of the pooled proceeds of prize as would apply to individual captors. Under the old practice it was the custom for damages given against captors to be paid by the Crown except in cases of culpable negligence or disregard of orders:

(1) (1815) 2 Dods. 48.
(2) (1800) 3 C. Rob. 129.
(3) [1916] 2 A. C. 77.
(4) [1920] A. C. 748.
(5) [1898] 1 Ch. 73.
(6) (1848) 2 Ex. 167.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

Der Mohr. (1) During the Napoleonic Wars Admiral Lord Keith received two grants of 20,521*l.* and 1800*l.* to make up the losses he had sustained in an action brought against him for wrongfully detaining an American ship at the Cape of Good Hope, and 54,921*l.* was paid from droits of Admiralty as an indemnification to various commanders of His Majesty's ships.

Formerly, the captor and the captor alone was liable: *Der Mohr* (1); *The Mentor.* (2) In *The Oscar II.* the negligence was that of the navigating officer alone, not of the other officers and crew. In the circumstances under which the claims in *The Bernisse* and *The Elve* arose, the captors, under the old practice, would never have been ordered to pay the damages. It is unjust to take from the prize fund damages resulting from obedience to orders issued by the civil authorities in the execution of which no discretion could be exercised.

Furthermore the words in the schedule to the Naval Prize Act, 1918, are "claims . . . . which captors would have been liable to pay"; the words "liable to pay" have a more limited meaning than "ordered to pay." These damages were consequential and did not follow either in fact or in law from the original wrongful act. In fact the vessels were equally liable to the risk of being torpedoed whether they were diverted to a British port or not; and in law the torpedoing was wrongful and constituted a flagrant violation of the principles of international law. The loss due to torpedo attacks, therefore, cannot be deemed to be the direct result of the deviation: see *The Betsey* (3); see also *The William.* (4)

Wylie replied.

Cur. adv. vult.

Feb. 8. The judgment of the tribunal (Lord Phillimore, Sir Guy Fleetwood-Wilson and Admiral Sir F. Doveton Sturdee) was delivered by

LORD PHILLIMORE. In these cases the Exchequer prefers

(1) (1800) 3 C. Rob. 129.
(2) (1799) 1 C. Rob. 179.
(3) (1798) 1 C. Rob. 93.
(4) (1806) 6 C. Rob. 316.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

claims against the Naval Prize Fund, under Part II. of the schedule of the Naval Prize Act, 1918, para. 5, which includes among charges on the fund: "Any other costs, charges, expenses and claims which the Tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by prize courts, as being costs, charges and claims which, had there been a grant of prize to captors, captors would have been liable to pay."

THE OSCAR II.

The *Oscar II.* was a neutral vessel, and only a portion of her cargo was contraband. She was seized by a British cruiser, and shortly after capture, was sunk by a collision between the cruiser and herself, the collision being due to bad navigation on the part of the officer in command of the cruiser.

The owner of 250 bags of coffee, being a parcel of the cargo, preferred a claim in the Prize Court in respect of its loss, and it being admitted in those proceedings that the collision was due to the negligent navigation of the cruiser, the judge of the Prize Court pronounced for the claim (1), and his decision was confirmed by the Judicial Committee of the Privy Council. (2) The result of this decision is that the Procurator-General on behalf of the Crown will have to pay the damages occasioned by the loss of this parcel of cargo; and upon the principle thus established, for the loss of the ship and freight, and any other non-contraband cargo. No damages have yet been assessed, and our judgment therefore is declaratory only.

There was no impropriety in the seizure of the ship for the purpose of bringing her into port, as it turned out that she had some contraband on board; and therefore the captor would not have been liable for the accident, if it had not occurred through his negligence. But the authorities show that if such an accident had occurred under the old Prize law, the negligent captor would have been liable to pay for the loss.

(1) [1919] P. 171. (2) [1920] A. C. 748.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

The cases of *Der Mohr* (1) and *The William* (2) are sufficient authority for this.

This being so, there can be no doubt that the claim falls within para. 5, and that the sums which the Procurator-General may properly pay to the various claimants will be charges upon the Naval Prize Fund, and we so decide.

It is perhaps worth notice that on the second occasion when the case of *Der Mohr* (1) was heard the contingency of there being a "whole fund of prize taken collectively" which "would compose a current account of profit and loss, out of which any particular damage might be repaired," was suggested.

THE BERNISSE AND THE ELVE.

These were two Dutch ships which were stopped in the course of a voyage to Rotterdam by a cruiser, and ordered by the captain of the cruiser (after communication with the Admiral) to proceed to Kirkwall for examination, because they had not what is called a green clearance among their papers. As however they had come from a French port with proper documents it was a mistake to have insisted on the want of the green clearance, and the ships never should have been sent to Kirkwall. There was no ground for condemning or detaining either ship or cargo, and it was, as already stated, a mistake to send them in for examination. It was a misapprehension of the Order in Council. The masters protested against being sent to Kirkwall, specially on the ground of the danger from German submarines: but their protests were overruled. As a result, while they were on their voyage to Kirkwall, they were attacked by submarines, one was sunk, and the other was damaged. Thereupon claims on their behalf were preferred against the Procurator-General, and against the commanding officer and the seizing officer, in the Prize Court. These claims were pronounced for in the Prize Court, and a decree was given against the Procurator-General and against the officers (3), and this decision has since been confirmed by the Judicial Committee of the Privy Council. (4) But the amount of the damages has not yet been determined.

(1) 3 C. Rob. 129; 4 C. Rob. 314.
(2) 6 C. Rob. 316.
(3) [1920] P. 1.
(4) [1921] 1 A. C. 458.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

The application on behalf of the Exchequer is that these damages, when determined, should form a charge on, and be paid out of, the Naval Prize Fund. The objection on behalf of the Fleet is based upon two grounds. First it is said that this is not the kind of claim which, according to the principles and practice heretofore observed by Prize Courts, the captors would have been ordered to pay. And secondly, that the language of the paragraph is not "ordered to pay," but "liable to pay," and that the word "liable" is in the particular connection a word of a more restricted meaning than "ordered."

As regards the first point there is the decision of the two Courts that this is a claim which, according to the ordinary principles of Prize law, ought to be compensated. This, however, is not conclusive. It has been pointed out by one of the members of the tribunal that there are no words in the statute relieving this tribunal from the responsibility of deciding for itself. But we ought to attach great weight to the decisions of Courts whose special business it is to determine such questions; and, moreover, the facts of the case have not been brought to our attention in any such detail or with such minute examination as would be necessary if we really intended to go in all points behind the decisions of the two Courts, based as they were upon a very thorough review of the Prize law on this subject, set out in the judgment of the Privy Council in a case arising out of the Crimean War: *The Ostsee.* (1)

We therefore take it that the error in ordering the two Dutch vessels to go to Kirkwall was such a grave one as would have entitled the owners of the vessels under the old practice to recover damages from the captor, and would therefore now entitle them to recover damages from the Crown, sued through the Procurator-General.

This, however, does not conclude the matter, and in respect of the next step, an argument of considerable subtlety was presented by counsel for the Fleet. He said in substance that the damages claimed were not direct but consequential;

(1) 9 Moo. P. C. 150.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

and that a claimant who prefers a claim for consequential damages must show that they follow in law and fact from the original wrongful act, and that these consequences had not been proved in the present case. Now to analyse this argument. That the consequences followed in fact there can be no doubt. It was during the deviating voyage that the two ships were torpedoed. If it is said that they might have been torpedoed all the same if they had continued on their original voyage, the answer is that a wrongdoer who sets up such a defence must prove not that misfortune might, but that it would, have happened in any event. No attempt was made to prove this. It so happens that as to deviation we have a very closely analogous case in maritime law. The master of a ship which deviates from her voyage, causes his owner to forfeit all claim on his underwriters, and renders him in respect of the cargo an insurer, so that if the cargo be lost or damaged, even by causes which according to the common law would not make the carrier liable, such as the act of God or the King's enemies, he is nevertheless responsible: *James Morrison & Co.* v. *Shaw, Savill, & Albion Co.* (1) If such be the responsibility of an owner when his servant the ship master deviates from his voyage, the responsibility of one who compels the master to deviate ought to be as great.

So far for the consequences in fact. Now for the consequences in law. The argument for counsel for the Fleet appears to be that if these vessels had been lost or injured by what might be called legal enemy action—action in accordance with the principles of international law which ought to govern the relations of a belligerent with a neutral—liability might be established; but that inasmuch as the German action in torpedoing these vessels at sight was—as it certainly was—unwarranted by international law, it could not be deemed in law a consequence of the deviation. This argument which has otherwise, so far as we are aware, no support in authority, was founded upon the decision of Sir William Scott in *The Betsey*. (2) The circumstances in

(1) [1916] 2 K. B. 783. (2) 1 C. Rob. 93.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

that case were these. The island of Guadaloupe was captured by the British from the French, and the *Betsey*, an American vessel, being at the island, was captured at the same time, although she ought not to have been taken. While she was still at the island and in the possession of the British captor, the island was retaken by the French, and as the *Betsey* was at the time in British possession she was seized by the French, and legally so seized as prima facie British property, and apparently condemned as prize in the French Court. The American owner took proceedings in the English Prize Court against the captor, and Sir William Scott dismissed his claim upon the ground that the condemnation by the French Court was not a legal consequence of the original improper British seizure. But he so decided, not upon the ground that the French were proceeding illegally, but upon the ground that there was every reason to suppose that the French would and did proceed legally, and that this being so, if the American owner had taken the proper steps in the French Courts, America being a neutral in the war, and in amity with France, there would have been no loss. Sir William Scott proceeded upon his knowledge of international law as administered by the French Courts, and in substance he said that it was the laches of the American owner in not preferring his legal claim before the French Prize Court, and not the original wrongful seizure, that caused the loss.

The cases, therefore, are not parallel. Here we know that no action on the part of the Dutch shipowners could have prevented the loss; and if instead of German belligerents acting contrary to international law, there had been pirates on the high seas who had taken or destroyed the Dutch vessels on their deviating voyage, there is no reason to suppose that Sir William Scott would not have held the English captor liable for this consequence of his wrongful act. Therefore our tribunal examining the matter for itself arrives at the same conclusion, which it is satisfactory to be able to arrive at, at which the English Prize Court and the Judicial Committee on Appeal arrived, and the first point taken by counsel for the Fleet fails.

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

Then we have to consider his second point: that of the language of para. 5 and the word "liability." The argument is this. Under the old practice, a captor who had acted as the naval officers acted in this case and had rendered himself liable in the Prize Court for a claim to restitution, would have been certainly indemnified by the Government, and would have lost nothing, the practice being, as is well known and mentioned in more than one of Sir William Scott's judgments, for the Government in such cases to indemnify. As, therefore, the captor would not have been ultimately out of pocket, neither is the Naval Prize Fund, representing all the captors in the war, to bear the loss. But this is a misapprehension of the word "liable." If B. puts himself under an obligation to A. against which obligation he is indemnified by C., the claim of A. is not against C., but against B.; and whether C. can or cannot, will or will not, discharge his duty to indemnify is immaterial to A. B. is liable, and it is the correct word to use, to A. In all probability the word "liable" is used, not as a more restrictive word than "ordered," but as a word in some respects on a different plane, in other ways wider than the word "ordered." It is on a different plane, because it implies and requires this tribunal to be satisfied, where B. has been ordered to pay A. that he has been properly ordered to pay A., because he was liable to him. And it is a wider word, because it requires this tribunal to admit a charge upon the fund where liability is established without the necessity of there being an order by some other Court. As an example, one may refer to the claim in *The Oregon* which has been partially heard before us, and adjourned for further material, where the Procurator-General has not waited for a decree to be made against him by the Court of Prize, but has compromised and paid a certain sum in respect of his alleged liability, and where this tribunal without the assistance of the Court of Prize will have ultimately to determine for itself whether the Procurator-General was right in so far admitting his liability, and prudent and reasonable in respect of the compromise which he has made.

Upon the whole, therefore, we must declare that in the case

1921

THE OSCAR II.; THE BERNISSE; THE ELVE.

of *The Bernisse* and *The Elve*, as in the case of *The Oscar II.*, the damages when ascertained—and it is hoped that there will be no delay in that ascertainment—will be a charge upon the Naval Prize Fund. As in previous cases, our declaration will be accompanied by an order that the costs of counsel for the Fleet will be a charge upon the fund.

Solicitor for the Exchequer and for the Fleet: *The Treasury Solicitor.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

C. A.

1921

Feb. 16.

THE DANUBE II.

Admiralty—Public Authority—Servants of the Crown—Action against Commanding Officer of King's Ship—Limitation of Actions—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61)—*Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

The Public Authorities Protection Act, 1893, applies to servants of the Crown acting within the scope of their public duties, and the Act is not impliedly repealed, as regards actions in respect of damage by collision, by s. 8 of the Maritime Conventions Act, 1911, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners [or any other person responsible for the fault of the vessel (s. 9)] in respect of any damage to another vessel unless the proceedings are commenced within two years.

Accordingly, actions against commissioned officers in charge of His Majesty's ships for damage by collision must be commenced within six months and not within the period of two years allowed by the Maritime Conventions Act.

Decision of Hill J. affirmed.

APPEAL from a decision of Hill J. (1) in an action of damage by collision.

The plaintiffs (appellants), the owners, master, and crew of the Norwegian steamship *Norrona*, sought to recover from Lieutenant Harry Jewiss, R.N.R., the amount of the damage which they had suffered by the loss of their steamship and effects in a collision between the *Norrona* and a battle practice

(1) [1920] P. 104.

C. A. 1921

THE DANUBE II.

target which was in tow of H.M. tug *Danube II*. The collision took place on December 7, 1917, in the Thames Estuary, when the *Norrona* was on a voyage from Fécamp to Middlesbrough in ballast, and the battle practice target was being towed from Portsmouth to Scapa Flow. The defendant's case was that without any negligence on his part the target took a sudden sheer to port, and that it was not possible to prevent it from striking the *Norrona*, which was at anchor. Alternatively the defendant pleaded that he was acting in pursuance or execution, or intended execution, of a public duty or authority, and that as the action had not been begun within six months after the act, neglect, or default complained of, he was entitled to rely on the Public Authorities Protection Act, 1893 (1), and the claim must be dismissed.

Hill J. held the defendant alone to blame for the collision, but dismissed the action on the ground that it had not been commenced within six months after the date of the collision.

The plaintiffs appealed.

R. A. Wright K.C. and *Dumas* for the appellants. The Crown itself is not liable; it cannot be sued and does not need protection; its servants accordingly do not need protection and the Public Authorities Protection Act does not apply. The Act was passed to protect public authorities and their servants in the execution of public duties. The decisions (unreported) of Darling J. in *Benney* v. *Fitzgerald* and Lawrence J. in *Sexty* v. *Wells* are wrong and should be overruled. The defendant was not carrying out a public duty

(1) Public Authorities Protection Act, 1893, s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect.

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . ."

because it was not a duty he owed to the public; it was a duty he owed to the Crown as a servant of the Crown: cf. *Bradford Corporation* v. *Myers*. (1)

If the Act applies to servants of the Crown it was in effect superseded as regards actions of damage by collision by s. 8 of the Maritime Conventions Act, 1911, which obviously was intended to introduce a universal period of two years in conformity with international conventions. In *The Caliph* (2) it was held that in actions for loss of life arising out of collisions dependents had two years under the Maritime Conventions Act instead of one year as provided by Lord Campbell's Act, and the same reasoning applies as regards the Public Authorities Protection Act.

Sir Gordon Hewart A.-G. and *C. R. Dunlop K.C.* for the respondent. It can hardly be denied that the Crown is a public authority, and it is not necessary that the public authority—in this case the Crown—should be liable to be sued. It is obvious from s. 2 of the Public Authorities Protection Act, which repeals sections of various Acts placing restrictions upon actions brought against a variety of public authorities, that the Act was intended to apply to servants of the Crown, as the section repeals (inter alia) s. 51 of the Naval Prize Act, 1864, and s. 24 of the Dockyards Ports Regulations Act, 1865, which relate to proceedings against servants of the Crown: see also *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers*. (3) The object of the Act was to protect individual subordinates: see per Collins L.J. in *Greenwell* v. *Howell*. (4) The present case is the exact opposite of *Bradford Corporation* v. *Myers* (1), where the injury did not arise in the discharge of a public duty; in this case it was the duty of the Admiralty to maintain the efficiency of the fleet, and to ensure efficiency battle targets are necessary. The towage of the target to Scapa therefore was essentially a public duty.

[They were not called on to argue the question as to whether

(1) [1916] 1 A. C. 242.
(2) [1912] P. 213.
(3) (1904) 7 F. 168.
(4) [1900] 1 Q. B. 535, 540.

C. A. 1921

THE DANUBE II.

s. 8 of the Maritime Conventions Act superseded the Public Authorities Protection Act as regards actions of maritime collision.]

Dumas in reply.

LORD STERNDALE M.R. I think this appeal should be dismissed. The defence raises a point which, so far as I know—and, what is more important, so far as Hill J. in the Admiralty Court knows—has not been raised in an action of this kind before.

The action is against the master of a tug which was in the service of the Crown, and in the service of the Crown the master had to take a battle target up to Scapa Flow, for the practice of the fleet. On his way he was ordered to anchor in the Black Deep. In pursuance of those orders, in the course of his voyage, he navigated his tug so negligently, that his tow, the battle target, came into collision with a ship belonging to the plaintiffs and sank her.

The only defence raised is the Public Authorities Protection Act, 1893. [His Lordship read the section and continued :]

The appellants raise two contentions. First it is said that the Act does not apply to this case, because it does not apply to any person in the service of the Crown, and it does not apply to any persons in the service of a public authority which itself could not be sued. There is nothing to that effect in the Act. So long as it is in pursuance of a "public duty or authority," I do not see anything in the Act to restrict it to the service of any servant of an authority which itself could be sued. The Attorney-General called our attention to the fact that in the schedule which repeals a number of Acts placing restrictions upon actions brought against various kinds of public servants, there are two, at any rate, which relate to actions and proceedings against servants of the Crown ; and in the repeal section there occur these words : "There shall be repealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies the proceeding is to be commenced in any particular place or within any

particular time . . . . and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned." That section seems to recognize that the matters dealt with in the repealed Acts are matters which would be proceedings to which the Public Authorities Protection Act would apply. But apart from that altogether, it seems to me that a man who, under the orders of the Crown—in this case the Admiralty which is a department of the Crown—is taking a battle target to Scapa Flow for the purposes of the fleet, is undoubtedly engaged in a public duty. Perhaps no member of the public could complain if he did not take it ; but certainly he was doing what was for the benefit of the public, and under the authority of the Crown ; and it can, I think, hardly be denied that the Crown is a public authority. I think, therefore, that the Act applies to this case, and that none of the cases to which we have been referred in any way militate against that view. The same view has been held in cases not binding upon us, by Lawrence J. and Darling J., and it also seems to me to be involved in the decision in *Wilson* v. 1*st Edinburgh City R. G. A. Volunteers.* (1) In my opinion, therefore, the first point fails.

The second point is that, even if the Public Authorities Protection Act applied before the passing of the Maritime Conventions Act, 1911, that Act has altered the position. I cannot see that that is so, even if the Maritime Conventions Act applies to the Crown at all. It is "An Act to amend the law relating to Merchant Shipping," and it is to be read with the Merchant Shipping Acts. The section to which we were referred is s. 8, which says : "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel . . . . unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused." It

(1) 7 F. 168.

C. A. 1921

THE DANUBE II.

Lord Sterndale M.R.

does not seem to me that, even assuming this Act to apply as against the Crown, that section is in any way inconsistent with the Public Authorities Protection Act. There may very well co-exist a general limitation of all actions in respect of maritime damage to two years, and a further limitation where the action is brought against persons of a specific class to six months in the case of those persons. I see nothing inconsistent in the two Acts. I think that second point also fails and that the appeal should be dismissed with costs.

SCRUTTON L.J. On the first point argued, I share the difficulty that the House of Lords felt in *Bradford Corporation* v. *Myers* (1), in knowing exactly what the limit is in the Public Authorities Protection Act between those acts which are protected by the measure of limitation and those acts which are not. But on the best consideration I can give to the matter it appears to me that the Admiralty were under a public duty to make provision for public defence; that in carrying out the particular measure of sending a battle target to Scapa Flow by tug, they were carrying out that public duty; and that the neglect of the servant in charge of the tug was a "neglect in the execution of any such duty" within the words of the Act. The particular action, therefore, is prima facie within the Public Authorities Protection Act.

On the second point, this Court has recently had to consider the principles on which a subsequent statute is held to repeal a prior statute, and the principles are to be found stated with authorities in *Flannagan* v. *Shaw*. (2) In that case I cited a passage of Lord Coke's in *Foster's Case* (3): "Only it must be known, that forasmuch as Acts of Parliaments are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated" and the modern expression by A. L. Smith J. of the same principle in *Kutner* v.

(1) [1916] 1 A. C. 242. (2) [1920] 3 K. B. 96, 105.
(3) (1614) 11 Rep. 56*b*, 63*a*.

Phillips (1): "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together." Then he says: "Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together." In this case, the later Act has a general provision, applicable to all sorts of people, of a two years' limitation; and there was the prior Act, with a special provision applicable to public authorities only, of six months' limitation. I see no reason why the two should not stand together, and I see no plain words in the second Act showing that Parliament intended to repeal the first Act.

For these reasons I agree that the appeal should be dismissed.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants: *Constant & Constant.*
Solicitor for the respondent: *The Treasury Solicitor.*

(1) [1891] 2 Q. B. 267, 271.

E. C. M. T.

1921
Mar. 2, 9.

ADMIRALTY.

(In Prize.)

THE ORANJE NASSAU and Other Ships.

Prize Court—Practice—Costs—Charging Order—Security for Costs—Prize Court Rules, 1914, *Order* XVIII., *r.* 1, *Order* XLV.

The power of the President under Order XLV. of the Prize Court Rules, 1914, to direct what practice shall be followed in prize proceedings in cases for which no provision is made in these Rules does not extend to the creation of new rights against captured goods, and the Court's discretion as to costs under Order XVIII. cannot be used to increase the burden of neutral claimants.

When captured goods are found to be free from condemnation, the only liability to which they are subject is captors' costs enforceable by international law and arising in the specific cause. Accordingly, the Crown is not entitled, against the proceeds of goods ordered to be released to claimants, to a charging order in respect of unpaid costs in other causes in prize in which the claimants' goods have been condemned and the security ordered to be given has proved to be insufficient.

Cross Summonses adjourned into Court for judgment.

On January 26, 1921, 1000 bags of coffee and 100 bags of cocoa seized as prize ex the steamship *Oranje Nassau* were found by the learned President to have had an innocent destination, but having regard to the conduct of the Venezuelan claimants, Messrs. R. & O. Kolster, who were parties to schemes for the evasion of belligerent rights, the release of the goods was made subject to the payment of the Crown's costs of the proceedings. It appeared, however, that in three other cases—namely, the steamship *Talisman*, the steamship *Skogland*, and the steamship *Selandia*—goods belonging to the claimants had been condemned with costs, but the security for costs ordered to be given had proved insufficient to pay the taxed costs of the Crown, and a sum of 219*l.* remained due and owing from the claimants. Thereupon cross summonses were issued: (*a*) by the claimants for the release of the proceeds of sale of the coffee and cocoa ex the *Oranje Nassau* on the personal undertaking of their solicitors for the costs in that cause; (*b*) by the

Procurator-General for a charging order on the proceeds to cover the unpaid costs in the three other causes.

C. W. Lilley for the Procurator-General.

L. F. C. Darby for the claimants.

Cur. adv. vult.

March 9. The following judgment was read by

THE PRESIDENT (SIR HENRY DUKE): These were cross summonses issued by the Procurator-General and the claimants respectively in respect of a fund of about 8000*l.* dealt with by the decree in a cause of condemnation dated January 26, 1921, whereby release to the claimants of the fund was ordered subject to payment by them of the costs of the cause. The claimants ask by their summons for payment out against their solicitors' personal undertaking for payment of any excess of the costs beyond the security in Court. The Procurator-General did not object to the proposed security, but he claims that a charging order should be made against the fund in respect of certain balances of costs, amounting to 219*l.* in all, which remain unpaid and, as is said, due by the claimants in other causes in prize where the security ordered by this Court to be given by the claimants proved to be insufficient to cover the amounts of the costs taxed against them.

The claim of the Procurator-General appears on the face of it a practical and business-like claim. In support of it counsel admitted that it is without any precedent in prize, but pointed out that the procedure of the High Court of Justice provides for execution by charging order practically as of right where there is a proved or admitted debt due to the applicant and a fund of the debtor under the control of the Court which can be made available to satisfy the debt. Reference was also made to *The Dirigo* (1), and to the power of the President under Order XLV. of the Prize Court Rules, 1914, to determine what shall be the practice in matters not provided for by the rules.

Counsel for the claimant contended that the power of the Court to order payment of costs by the claimants in the

(1) [1920] P. 425.

1921

THE ORANJE NASSAU.

The President.

respective causes in which the balances claimed are due was completely exercised when the Court fixed in each the amount to be provided by the claimants by way of security and by its decree made such security available in satisfaction of costs. He also argued that the practice of the Supreme Court in relation to charging orders by way of execution is no part of the practice of this Court.

There can be no doubt, I think, that prize and funds in Court as the proceeds of prize are exempt from process of execution under municipal law so long as the cause in prize is pending. Captured goods are brought in for adjudication in prize and for no other purpose. Once the captured property is found to be free from condemnation the only liability arising after capture to which it is subject is the liability for captors' costs. None of the statutes, and rules of law and practice, which relate to execution against property found within the jurisdiction under normal conditions have any relation to goods brought in as prize. Over such goods this Court alone has jurisdiction within the United Kingdom, and its jurisdiction is of the limited nature which I have described. The power of the President under Order XLV. of the Prize Court Rules, 1914, does not extend to the creation of new rights against captured goods; and the discretion as to costs under Order XVIII. of the same Rules cannot, as I think, be used to increase the burdens of neutral claimants. (1) It is perhaps worth while to notice that in *The Jefferson* (2) Lord Stowell declined to entertain an application by the assignees in bankruptcy of an English trader for a rehearing in a cause in which it was alleged after a decree for release to neutrals that the bankrupt had at the time of decree an interest in the captured goods, and in *The Mercurius* (3) he stated it as a rule that claimants in a cause of condemnation can only be required

(1) Prize Court Rules, 1914, Order XVIII. (1.): "The costs of and incident to all prize proceedings shall except when otherwise provided by any agreement, or by statute, be in the discretion of the Judge."

Order XLV.: "In all cases not provided for by these Rules, the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the President may direct."

(2) (1799) 1 C. Rob. 325.

(3) (1798) 1 C Rob. 80.

1921

THE ORANJE NASSAU.

The President

to deal with the case of the captor by whom the prize is brought in. It seems to me, then, that goods ordered for release in prize are subject to no execution at the suit of a creditor under municipal law, and in prize are free from liability except as to the specific claims arising in the cause which by international law are enforceable against them in the cause. The order made here in *The Dirigo* (1) related to costs in the cause of which the goods charged were the subject matter, and the questions now raised did not arise.

Assuming for the purposes of the present case that the decrees against the claimants under which balances are due to the Procurator-General were effectual to create the full relations of debtor and creditor—as to which, however, I make no decision—it would be, in my opinion, contrary to principle to enforce these decrees by process of execution against this fund the subject of a separate cause, and I therefore do not make the charging order which is claimed by the Procurator-General's summons.

The goods will be released upon the personal undertaking of the claimants' solicitors for payment by the claimants of any excess of costs in the cause beyond the amount of the security already given in the cause.

Solicitors for the claimants: *Waltons & Co.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

(1) [1920] P. 425.

E. C. M. T.

Applied. Re WINGHAM (*decd.*). [1948] 2 All E.R. 908.

C. A. 1921 Jan. 18.

Applied. In the Goods of NEWLAND [1952] P. 71

[IN THE COURT OF APPEAL.]

In the Estate of GOSSAGE (DECEASED).

WOOD *v.* GOSSAGE.

[1920. G. 177.]

Will—Revocation—Soldier "in actual military service"—Will executed in accordance with requirements of Wills Act—Letter by Testator requesting Will to be burnt—Will burnt not in presence of Testator—Intention to revoke—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 9, 11, 20.

Under the Wills Act, 1837, no formalities are required for the execution of a soldier's will and therefore none are required for its revocation.

Testator, a soldier, on October 24, 1915, when under orders to proceed with his unit to South Africa, made his will in accordance with the requirements of the Wills Act, 1837, whereby, after certain legacies, he gave the whole of the residue of his personal estate to the plaintiff, to whom he was then engaged to be married, and appointed her his sole executrix. Before starting he handed to her a sealed envelope, which he stated contained his will, and directed her not to open it unless anything happened to him. Subsequently, in consequence of certain statements made to him by the plaintiff as to her conduct during his absence, he wrote to her from South Africa directing her to hand over the will to his sister K., which she accordingly did. On January 9, 1918, he wrote to K. from Cape Town a letter in which he requested her to burn his will, as he had, as he said, already cancelled it. K. accordingly burnt the will as requested. In November, 1918, the testator died in hospital in South Africa, and amongst his belongings there was found a copy of his original will. In an action brought by the plaintiff to establish the will:—

Held (affirming the decision of Bailhache J.) that s. 20 of the Wills Act which prescribed the formalities necessary for the revocation of wills did not apply to soldiers' wills, and that the will had been effectively revoked by the letter of January 9, 1918.

APPEAL from a judgment of Bailhache J.

The testator James Alfred Dale Gossage was formerly a packing-case maker living in Birmingham and a member of the Territorial Force. At the outbreak of war he was called up for active service, and in November, 1915, was sent with his unit to South Africa. On October 24, 1915, he made his will in accordance with the requirements of the Wills Act, 1837, whereby after bequeathing certain legacies he gave the whole of his property, which

consisted entirely of personal estate, to the plaintiff Annie Wood, to whom he was then engaged to be married, and appointed her his sole executrix. Shortly before leaving England he handed her a sealed envelope which he stated contained his will and told her that she was not to open it unless anything happened to him.

In 1917 he received a letter from the plaintiff containing statements about her conduct and in reply wrote on April 9, 1917, a letter in which he said: "I can't imagine what has come to you to carry on in that way for although it is very hard for you C. and me it must be terrible for your mother and father. Well there is one thing I would like to thank you for and that is the way you have looked after my things since I have been away and I will be much obliged if you will hand all my belongings over to Kate."

Kate there referred to was Kate Gossage, the testator's sister. The plaintiff handed over the property as requested, including the envelope containing the will.

On January 9, 1918, he wrote from Cape Town to Kate Gossage a letter which contained the following passage: "I was pleased to see that you got everything in order from Nance (the plaintiff) although of course I had no doubt that you would for although after what has happened I am sure I could trust her as regards other things. As regards the will if you haven't already done so I want you to burn it for I have already cancelled it."

On January 22, 1918, he again wrote to Kate Gossage a letter in which, referring to her inquiry whether he had received all her letters, he said that he supposed he had, "but I have had a lot and as regards the important news, well, I told you in my letter which I wrote last week what they were about so I don't know if it is the will you are referring to as I told you to destroy it."

After receiving the letter of January 9, 1918, Kate Gossage burnt the will in Birmingham, but on what precise date did not appear.

On November 19, 1918, the testator died in hospital in

C. A. 1921

GOSSAGE, *In the Estate of* WOOD *v.* GOSSAGE.

South Africa, without having made known his further intentions as to the disposition of his property verbally or by any informal document. A copy of the will which he had given instructions to destroy was found among his possessions, in his own writing, but attested by only one of the two witnesses to the will.

In January, 1920, the plaintiff commenced the present action against the defendants, the next-of-kin, to establish the will. The action was tried before Bailhache J. at the Birmingham Assizes on July 27, 1920.

Bailhache J. held that a soldier's will could be effectively revoked by its destruction by a third party in the absence of the testator, and that the will had been effectively revoked by the letter of January 9, 1918. He accordingly pronounced against the force and validity of the will and gave judgment for the defendants.

The plaintiff appealed. The appeal was heard on January 18, 1921.

W. J. Gandy (*D. Cotes-Preedy* with him) for the appellant. The formalities necessary for the making of a will are prescribed by s. 9 of the Wills Act. By that section every will is to be in writing and signed by the testator and attested by two or more witnesses. By s. 10 appointments by will are to be executed like other wills. Sect. 11 provides: "Provided always, that any soldier being in actual military service, ... may dispose of his personal estate as he might have done before the making of this Act." This latter section is merely a proviso to the two preceding sections and does not extend to the whole Act, as was pointed out by Younger J. in *In re Wernher*. (1)

[YOUNGER L.J. The Wills (Soldiers and Sailors) Act, 1918, goes to defeat the view I took in that case.]

The effect of the section was to place soldiers in a privileged position as regards the execution of wills disposing of personal estate. The section says nothing as regards the revocation of any wills that they may have made. The only provisions in the Act dealing with the revocation of wills are those

(1) [1918] 1 Ch. 339, 353, 354.

contained in ss. 18, 19, and 20, which together form a code on the subject and apply equally to soldiers' and civilians' wills. Sect. 18 provides that "every will" shall be revoked by marriage and therefore includes a soldier's will. Sect. 19 provides that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. Sect. 20 is in these terms: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and at his direction, with the intention of revoking the same." The words "no will" in the section, it is submitted, apply to all wills and therefore include soldiers' wills. The words "with the intention of revoking the same" mean that the intention of the testator to revoke must exist at the time the tearing or burning of the will takes place. If therefore, in the present case, the intention of the testator to revoke his will by burning or destroying it continued it is difficult to account for the fact that a copy of it was found amongst his effects in South Africa after his death. It is true that at the time he wrote the letters of January 9 and 22, 1918, it may have been his intention to revoke his will, but it is submitted that the fact that he kept a copy of it shows that he had changed his mind. Moreover in order to come within the section the burning of the will must take place in the presence of the testator. Here the burning took place at Birmingham at a time when the testator was himself absent in South Africa. Again, the testator might have altered his will by an unattested codicil, but he could only revoke it in accordance with s. 20. Neither of the letters was a codicil. In order to be a codicil the document must be in its nature testamentary and neither of the letters can be said to be of that character.

E. W. Cave for the respondents.

[LORD STERNDALE M.R. You may take it that we are of

C. A. 1921

GOSSAGE, *In the Estate of* WOOD *v.* GOSSAGE.

opinion that the testator had an intention to revoke his will and did not change it.]

It is submitted that s. 11 means what it says—namely, that a soldier being in actual military service may dispose of his personal estate as he might have done before the passing of the Act, that is, as he might have done before the Statute of Frauds.

[YOUNGER L.J. referred to *Drummond* v. *Parish*. (1)]

Before the Statute of Frauds any person could have revoked his will in precisely the same way as the testator did in this case: *Doe* v. *Harris* (2); *Walcot* v. *Ochterlony*. (3) Applying those decisions to this case, any alteration to a will, and therefore its revocation, can be made informally by a soldier. See also *In the Goods of Tweedale*. (4)

[YOUNGER L.J. But it is said that the letter of January 9, 1918, disposes of nothing.]

The word "dispose" in s. 11 implies, it is submitted, that the testator may give such directions that the necessary result happens. He must be presumed to intend the necessary consequences of his act—namely, to allow the law to make a will for him. The letter of January 9, 1918, is therefore a valid disposition by the testator of his property, although he did not therein state to whom it was to go. The effect of s. 11 is to cover every possible disposition by a soldier of his property, and the other sections of the Act, so far as they impose formalities of execution, have no application to a soldier's will.

W. J. Gandy in reply. *Doe* v. *Harris* (2) was a case of fraud and has no bearing on this case. The decision in *Walcot* v. *Ochterlony* (3) turned on the Statute of Frauds, which contains no section which corresponds with s. 11 of the Wills Act. It is therefore no authority for the proposition for which it is cited. It is not, it is submitted, the fair construction of the word "dispose" in s. 11 to read it as meaning that a testator by revoking his will makes a fresh disposition of his property by allowing it to devolve according to law.

(1) (1843) 3 Curt. 522.
(2) (1838) 8 Ad. & E. 1.
(3) (1837) 8 Ad. & E. 4*n*.
(4) (1874) L. R. 3 P. & M. 204.

The word means doing something by which the destination of the property is altered. A disposition resulting from a revocation is not a disposition made by the testator but by Act of Parliament.

[He also referred to *In the Estate of Wardrop.* (1)]

LORD STERNDALE M.R. This is a rather curious case. It arises in these circumstances. The testator was a non-commissioned officer in the Royal Engineers, and on active service at the time with which we have to deal. On October 24, 1915, he made a will, which, we are told, was in strict accordance with the Wills Act, 1837. By that will, after bequeathing certain legacies, he gave the residue of his property to the girl to whom he was then engaged. For some reason which no doubt appeared good to him he later on thought that she ought not to have his property and accordingly on April 9, 1917, he wrote a letter to her in which he said: "I will be much obliged to you if you will hand over all my belongings to Kate." Kate was his sister. She did so. Then on January 9, 1918, he wrote to his sister a letter in these terms: [His Lordship read the material portions of the letter and continued:] On January 22, 1918, he wrote another letter to her in which he referred to his request for the destruction of the will. There can, I think, be no question as to his intention to revoke his will. He died in hospital in South Africa in November, 1918, and among the documents in his possession there was found what is said to be a copy of his will signed by him but attested by one witness only.

It was argued that the fact that he kept that document showed an intention on his part not to revoke his will. I see no ground for that contention. Many persons keep copies of documents without intending to set them up.

It was said, however, that this was not a valid revocation of the will. It is obvious that great injustice would be done if this girl were to take the property, but I hope that that fact does not influence me to strain the Act of Parliament

(1) [1917] P. 54.

C. A. 1921

GOSSAGE, *In the Estate of.* WOOD *v.* GOSSAGE.

Lord Sterndale M.R.

against her. The real question turns on the construction of s. 20 of the Wills Act, 1837, but it is necessary first to look at some of the earlier sections in order to understand it. Sect. 9 provides: "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." Sect. 11 consists of a proviso: "Provided always, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act," that is to say, in any way in which a will could have been made at common law before the Statute of Frauds. Then s. 18 provides for the revocation of a will by marriage and s. 19 that "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." Sect. 20 is as follows: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." I think I omitted to mention that the sister did in fact destroy the will. The will in this case could not have been burnt in the presence of the testator, because it was in England whilst he was in Africa. It was said however that there was here no valid revocation of the will because by s. 20 a soldier's will could not be revoked although it could be made without the formalities required, that is, by another will or codicil or by a document executed with the same formalities as are required in the case of a will which is not a soldier's will.

This appears to me to be an absurd result, but however absurd it may appear, effect must be given to it if that result arises from the Act.

I do not think, however, that it requires any straining of the language of the Wills Act to arrive at an opposite conclusion. It is quite clear, apart from the Act, that a soldier could at common law make or revoke a will without any formalities. Is this letter of January 9, 1918, a "writing declaring an intention to revoke the" will "and executed in the manner in which a will is hereinbefore required to be executed" or is it "another will or codicil" within the meaning of s. 20? The word "revocation" postulates the existence of a previous will, and I think the words of the section must mean "executed in the manner hereinbefore required for the execution of the will which it is intended to revoke." If you read ss. 9 and 11 together no formalities are prescribed for the execution of a soldier's will, but soldiers are allowed to dispose of their personal estate as they might have done before the Act, that is to say, as they might have done before the Statute of Frauds.

If that is the correct view then it seems to me that the letter of January 9, 1918, is a sufficient writing declaring an intention to revoke the will and executed in the manner required by the Act with regard to that particular will. In the case of a civilian's will certain formalities are required, in that of a soldier's will no formalities at all are necessary, and therefore upon the interpretation of the Act no formalities are required to revoke a soldier's will. That being my view I think there was here a valid revocation of the will and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. I think there are more grounds than one for approving the judgment of Bailhache J., but I prefer that taken by the Master of the Rolls, that is, by comparing s. 20 of the Wills Act with ss. 9 and 11. Sect. 9 is expressed in a negative form. [His Lordship read the section and continued:] Sect. 11 is in the form of a proviso: "Provided always, that any soldier

C. A. 1921

GOSSAGE, *In the Estate of.* WOOD *v.* GOSSAGE.

Warrington L.J.

being in actual military service . . . . may dispose of his personal estate as he might have done before the making of this Act." Now the reference to the disposition of personal estate, being in a statute relating to wills, must mean a testamentary disposition of personal estate. Of course no formalities were attached to a disposition of personal estate by a soldier before the passing of this Act although he had to do something in the way of a testamentary disposition. Turning now to s. 20 [His Lordship read the section and continued :] In my judgment the words " in the manner in which a will is hereinbefore required to be executed " must be read with reference to the particular will with which you are dealing. If the will is that of an ordinary person you look at s. 9 ; if that of a soldier you look at s. 11 to see what the requirements are and you find that they are those which were in existence before the passing of the Act. If therefore the document expressing an intention to revoke a previous will satisfies the requirements necessary before the passing of the Act, then it satisfies the requirements of the Act itself. It is clear that the testator intended to revoke his will. That is shown by his letter of January 9, 1918, to his sister requesting her to burn his will. In other words, that document declares the intention of the testator to revoke his will. He had not " cancelled " his will in a physical sense, but he meant by that letter that he had determined it and he believed that it was revoked. That, in my opinion, is a sufficient ground on which to dispose of this appeal. The appeal therefore fails and must be dismissed.

YOUNGER L.J. There can, I think, here be no doubt that this soldier testator did intend, when he wrote his letter of January 9, 1918, to revoke his will in favour of the present plaintiff consequent upon the end brought, apparently by herself, to their engagement. There can equally be no doubt that before the passing of the Wills Act the revocation of his will so made would have been completely effective.

Before the Wills Act the special testamentary privileges in relation to their personal estate which were enjoyed by

soldiers and sailors on active service consisted in their being dispensed from those formalities of execution required from all other testators. They did not enjoy any testamentary capacity not possessed by other persons. As Sir Francis Jeune P. in *In the Goods of Hiscock* (1), referring to s. 11 of the Wills Act, said: "I am inclined to the view that the reason and principle underlying those words are the same as prevailed under the Roman law, namely, that a soldier in the circumstances mentioned, or a sailor who is actually at sea, is, possibly, not altogether, but certainly to a great extent, inops consilii, and therefore not in a position to make his will in the form required of persons in ordinary circumstances." That statement remains, I think, correct. That s. 11 of the Act must now be recognized to have a further effect results from the declaratory enactment contained in s. 1 of the Wills (Soldiers and Sailors) Act, 1918, that s. 11 of the Wills Act authorizes and always has authorized any soldier being on active military service to dispose of his personal estate as he might have done before the passing of the Act, though under the age of twenty-one years. The result follows that, for example, s. 7 which enacts that "no will made by any person under the age of twenty-one years shall be valid," general as are its terms, has, on the now declared construction, no application to a soldier's or a sailor's will. Similarly, in my judgment s. 20 has no relation to such a will. Its language is no more general than the language of s. 9, and if it were held, so far as its prescribed formalities are concerned, to extend to dispositions of soldiers and sailors referred to in s. 11, it would, in my judgment, go far to deprive these testators of the privileges reserved to them in the matter of formalities by that section. For the power which a soldier has to revoke his soldier's disposition follows, as I think, from the power reserved to him by the statute to make one. It is, in my judgment, true to say that the power of revocation is merely another aspect of the power of disposition, and that power which he had before the statute remained, I think, unaffected by the statute. In saying that I differ in no

(1) [1901] P. 78, 80.

C. A. 1921

GOSSAGE, *In the Estate of.* WOOD *v.* GOSSAGE.

way from the views expressed by my Lord and the Lord Justice on the footing that s. 20 should be read as having some reference to s. 11. I merely desire to show that the same conclusion can be reached if s. 20 has no such reference—the view of the section which on the whole, speaking for myself, I prefer. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Foster Grave & Co., for Philip Baker & Co., Birmingham.*

Solicitors for respondents: *E. H. Davies & Co., for Hooper, Ryland & Boddington, Birmingham.*

W. I. C.

1921

Feb. 23; *March* 10.

DIVORCE.

KEYES *v.* KEYES AND GRAY.

Divorce—Domicil—Residence—Matrimonial Jurisdiction of Indian Courts—Dissolution of Marriage between English Subjects resident but not domiciled in India—Validity—Indian Divorce Act, 1869 (*Act IV. of* 1869)*—Indian Councils Act,* 1861 (24 *&* 25 *Vict. c.* 67)*—Indian High Courts Act,* 1861 (24 *&* 25 *Vict. c.* 104).

Divorce Courts in India have no jurisdiction to decree dissolution of a marriage between parties not domiciled in India, though the marriage was celebrated and the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the Indian Courts.

IN this case the parties were married in the Calcutta Cathedral in November, 1916, the husband being an officer in the British Army who was on service in India. The wife was an English girl who had come out to Calcutta to be married to him. They resided together in India until February, 1918, but had never acquired an Indian domicil. On February 6, 1918, a decree nisi for dissolution of the marriage was made by the High Court of the Punjab at Lahore, under the Indian Divorce Act, 1869. The husband, on his return to England, being advised that the validity of this

decree was doubtful filed his petition in this Court for a divorce. The case was unopposed.

On January 14, after the petition had been set down, but before it came into the paper,

T. T. Bucknill applied on behalf of the Secretary of State for India that he might attend to argue the case as amicus curiæ on the ground of its public importance.

SIR HENRY DUKE P. directed that the papers should be sent to the King's Proctor that he might instruct counsel to appear under s. 5 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144) to argue the question. He said that he thought the matter concerned the Crown and not only the Secretary of State for India.

On February 23 the case came on for argument.

Barnard for the petitioner called evidence proving that the petitioner was entitled to a divorce if the Indian divorce was held to be bad.

Noel Middleton held a watching brief for the respondent and co-respondent.

Sir Gordon Hewart A.-G. stated that the views of the King's Proctor differed from those of the Secretary of State for India, and it was thought expedient that the latter should be separately represented.

SIR HENRY DUKE P. said that he doubted whether the Secretary of State had a technical right to be heard, but he would hear counsel as amicus curiæ on any point the Secretary thought of public importance.

The sections of the Acts on which the question turned are set out below. (1)

(1) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22: "The Governor General in Council shall have power . . . . to make laws and regulations for all persons whether British or Native, Foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the Indian Territories now under the dominion of Her Majesty. . . . . Provided always that the said Governor General in Council shall not have the power of making any laws or regulations . . . .

1921

KEYES v. KEYES AND GRAY.

Sir Gordon Hewart A.-G., W. Bowstead and *T. T. Bucknill* for the King's Proctor. The jurisdiction depends upon the Indian Act of 1861, establishing the Court, which was passed by the Governor General in Council under the powers given him by the Indian Councils Act, 1861, s. 22—an Act of the Imperial Parliament—"to make laws affecting both British and Native subjects within the Territories."

These powers were further exercised by the Indian Divorce Act (Act IV. of 1869)[1]; but on the construction of that Act itself it is doubtful whether it was intended to give jurisdiction to grant a divorce to persons not domiciled in India By s. 2 the power is given over persons who "reside" in India. But s. 7 provides that the jurisdiction is to be exercised on principles conformable to those followed by the English Divorce Court. It may well be that having regard to this

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which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said Territories."

Indian High Courts Act, 1861 (24 & 25 Vict. c. 104) (Title—An Act for establishing High Courts of Judicature in India), s. 1, gives power to the Crown to establish High Courts by Letters Patent.

Sect. 9: "Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate and all such powers . . . . as Her Majesty may by Letters Patent direct."

Indian Divorce Act (No. IV. of 1869), s. 2: "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion, and resides in India at the time of presenting the petition . . . . or to make decrees of dissolution of marriage except in the following cases, (*a*) where the marriage has been solemnised in India, or (*b*) where the adultery . . . . complained of shall have been committed in India."

Sect. 3: "In this Act . . . . High Court means . . . . in the Territories for the time being subject to the Lieutenant Governor of the Punjab . . . . the Chief Court of the Punjab."

Sect. 7: "Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Courts for Divorce and Matrimonial Causes in England for the time being give relief."

section the word "reside" in s. 2 should be construed as equivalent to "domiciled," seeing that according to the principles now accepted in England, domicil alone can confer jurisdiction in divorce: *Armytage* v. *Armytage* (1); *Le Mesurier* v. *Le Mesurier* (2); *Rayment* v. *Rayment*. (3)

Even supposing that the Indian Divorce Act, s. 2, purports to confer jurisdiction to grant a divorce, based on mere residence, and is authorised to do so by the Indian Councils Act, s. 22, the divorce cannot take effect beyond the confines of India. In order that a decree of divorce should have an extra-territorial effect, a permanent domicil is essential to the exercise of the jurisdiction: *Le Mesurier* v. *Le Mesurier*. (4) British dominions, other than England itself, and even Scotland and Ireland, are regarded for this purpose as foreign countries. The Imperial Parliament cannot be taken by the general power it has given to the Governor General in Council, to have authorized him to legislate in a manner contrary to the accepted principles of Private International Law. The statement in Dicey's Conflict of Laws, 2nd ed., pp. 801–805, to the contrary, really involves a petitio principii—namely, that it was natural to suppose that the English Parliament intended to give divorce jurisdiction to the Indian Court.

[SIR HENRY DUKE P. The suggestion there seems to be that the jurisdiction is concurrent.]

We submit that that suggestion is unfounded. It would be contrary to reason that the Government of India should have a legislative power over a domiciled Englishman which is denied to self-governing British Colonies. The Indian Councils Act, 1861, s. 22, contains no express reference to matrimonial causes.

Sir Erle Richards K.C. and *Kenworthy Brown*, instructed by the Secretary of State for India (who were heard as amici curiæ). The importance of the question raised lies in the fact that it calls in question the legitimacy of children of subsequent marriages. For fifty years the Indian Courts have been granting divorces to residents who were not domiciled in India, and there

(1) [1898] P. 178, 185.
(2) [1895] A. C. 517.
(3) [1910] P. 271, 281.
(4) [1895] A. C. 517, 526, 540.

1921

KEYES v. KEYES AND GRAY.

is no reported case in which they were objected to on this ground. In fact, the earlier Charters for Indian High Courts show an assumed jurisdiction in matrimonial matters; and if the scope of the Indian Act is limited to India, that Act, which has received the sanction of the Crown, creates the very state of things which Lord Penzance in *Wilson* v. *Wilson* (1) refers to as "the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."

The principle that domicil is the exclusive test of jurisdiction was not clearly recognized in 1861, the date of the Indian Act. *Niboyet* v. *Niboyet* (2), which was decided in 1878, showed the view of the law which prevailed until the decision in *Le Mesurier* v. *Le Mesurier*. (3)

There are two questions to be decided: first, whether a divorce under the Indian Act would be recognized outside the Empire. That is answered by *Armitage* v. *Attorney-General*. (4) A decree of divorce pronounced in a country where parties were not domiciled would be recognized here by comity if the Court of the domicil would recognize it.

A second question is whether a decree would be recognized in the British Courts outside India.

On this point the Secretary of State relies on the usage of sixty years, and that usage is strictly within the authority given by the Imperial Parliament. The construction of the Indian Act of 1869, ss. 2, 7, is quite clear. The expressions "Christians" and "residents" are a survival of old jurisdiction and have always been construed in India as giving jurisdiction over residents as distinct from persons domiciled in India; in *Bannerjee* v. *Bannerjee* (5), Sir Lawrence Jenkins C.J., in dealing with a matrimonial case says: "The Indian Legislature has not made domicil the test."

The earlier matrimonial jurisdiction applied to Christian British subjects resident in India.

[SIR HENRY DUKE P. That was only the old Ecclesiastical jurisdiction of divorce a mensa et thoro.]

(1) (1872) L. R. 2 P. & M. 435, 442.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1906] P. 135.
(5) (1898) 3 Calcutta W. N. 250.

If there is an express jurisdiction by statute in the Indian Courts, the principle of *Le Mesurier* v. *Le Mesurier* (1) is distinguishable. In that case the common law of the Dependency was in question.

The observations of Cotton L.J. in *Thornton* v. *Thornton* (2) are exactly in point, although, having regard to the way in which the point arose, they are only a dictum.

[SIR HENRY DUKE P. That suggests concurrent jurisdiction. Is there any recent authority for that ?]

There is the authority of Cotton L.J. referred to. It would be a great hardship on Anglo-Indians to compel them to resort here. In the days of the East India Company there was for their officers and servants a possible domicil known as Anglo-Indian (Dicey's Conflict of Laws, p. 156). That however did not apply to officers of the Crown, and accordingly died out with the company.

In *Thornton* v. *Thornton* (3) in India the question of domicil was raised, but not decided. In *Warter* v. *Warter* (4) the validity of an Indian decree was assumed by Hannen P. He says that: "By the Indian Divorce Act of 1869, jurisdiction is given to dissolve the marriage when the petitioner professes the Christian religion and resides in India at the time of presenting the petition—that is, though he or she may not be domiciled there."

[SIR HENRY DUKE P. It would suffice for that decision that, assuming the extra-territorial validity of the Indian law of Divorce, the requirements of that law had not been satisfied.]

The older Charters conferring the jurisdiction of the Indian High Courts were made pursuant to 13 Geo. 3, c. 63, s. 13, and included ecclesiastical jurisdiction. The Charter of the Supreme Court of Calcutta, 1774, gave ecclesiastical jurisdiction over British subjects as exercised in London. Indians were not at that time British subjects in theory. The High Court Act of 1861, by s. 9, gave the High Courts to be established such matrimonial jurisdiction as the Crown might

(1) [1895] A. C. 517.
(2) (1886) 11 P. D. 176, 179.
(3) I. L. R. 10 Bombay, 422.
(4) (1890) 15 P. D. 152, 154.

1921

KEYES v. KEYES AND GRAY.

confer by Letters Patent, and any jurisdiction so permitted would be subject to the control of the Crown. The Letters Patent of 1865 establishing the High Court of Calcutta gave it "jurisdiction in matters matrimonial between our subjects professing the Christian religion."

The Punjab Court was not then a Chartered High Court, but derived its jurisdiction from Acts of the Governor General in Council; and the Indian Act of 1869 gave it the same jurisdiction in divorce as the Chartered High Courts. The High Courts Act of 1861 was substantially re-enacted in 1915; and this may be taken to authorize the use which the Indian Legislature had made of its powers. It is a fair comment on *Niboyet* v. *Niboyet* (1) that the legislators of 1861 could not have contemplated the doctrine of domicil as the exclusive test of jurisdiction. It was reasonable on account of Indian conditions that the jurisdiction of Indian Courts in divorce should be enlarged, and this was the course adopted. As to the question of concurrent jurisdiction, the Matrimonial Causes (Dominions Troops) Act, 1919 (9 & 10 Geo. 5, c. 28), is in point, for it gives jurisdiction to the Courts of the United Kingdom to pronounce dissolution of the marriage of a soldier which took place here, "any question of domicile or residence notwithstanding."

W. Bowstead in reply. There was no jurisdiction in India to divorce a vinculo prior to 1869, and it is only in that jurisdiction that the principle of domicil arises.

Cur. adv. vult.

March 10. SIR HENRY DUKE P. This is the petition of Reginald Keyes, a British subject domiciled in England, for dissolution of his marriage with the respondent Annie Brash Keyes, on the ground of adultery alleged to have been committed with the co-respondent Gerald Cecil Gelson Gray.

The marriage of the petitioner and respondent took place at Calcutta in November, 1916. Then and until after the Indian divorce proceedings to be presently mentioned the petitioner was in India on military duty as an officer in His

(1) 4 P. D. 1.

1921

KEYES v. KEYES AND GRAY.

The President.

Majesty's Army. Evidence was given before me of the adultery alleged in the petition, and the charges made by the petitioner against the respondent and co-respondent were fully proved. Proof was also made of a decree nisi of dissolution of the petitioner's marriage with the respondent, granted in the Chief Court of the Punjab at Lahore on February 6, 1918, by virtue of the Indian Divorce Act, 1869, and made absolute on November 14, 1918.

The petitioner has brought this suit to determine the validity, at any rate in England, of the decree made at his instance in India. As matters incident to that question it is to be stated that he has been throughout his life domiciled in England, and that he was of the Christian religion.

When the suit was set down for trial application was made on behalf of the Secretary of State for India in Council that counsel might be heard in the cause on the question of the validity of the Indian decree as a matter of grave importance to the Indian Government in relation to the interests of British residents in India. Directions were thereupon given under the provisions of the Matrimonial Causes Act, 1860, s. 5, which provides for the representation of the King's Proctor in this Court upon proper occasions, and at the hearing the Attorney-General was heard on behalf of the King's Proctor. When it appeared in the course of the hearing that the considerations relied upon by the Indian Government depended on arguments other than those advanced on behalf of the King's Proctor, I took advantage of the presence of Sir Erle Richards, who had been instructed by the Secretary of State, to receive from him as amicus curiæ some additional information as to Indian law and practice.

The powers of the Chief Court of the Punjab for the purposes now under consideration depend upon the Indian Councils Act, 1861—an Act of the Imperial Parliament; an Act of the Governor-General in Council, establishing that Court; and the Indian Divorce Act, 1869; both the latter Acts having been made by the Governor-General of India in Council in the

1921

KEYES v. KEYES AND GRAY.

The President.

exercise of the powers in that behalf conferred by the first-mentioned Act of the Imperial Parliament.

The East India Councils Act, 1861, s. 22, grants to the Governor-General of India in Council power to make laws and regulations for all persons, and for all Courts of Justice, and for all places and things within the territories of the Crown in India.

The East India High Courts Act, 1861, provides that the Courts therein described shall have and exercise all such jurisdiction, including matrimonial jurisdiction, and all such powers and authority for and in relation to the administration of justice within the limits defined by the Act, as the Sovereign may by Letters Patent grant and direct. Letters Patent under the last-mentioned statute were stated to have been issued and to have conferred jurisdiction in " matters matrimonial " between subjects of the Crown professing the Christian religion.

The Indian Divorce Act, 1869, is an enactment applying to the whole of British India, which creates and regulates a jurisdiction in matrimonial causes similar to, but not identical with, that defined in the Matrimonial Causes Acts in force here. One of the Courts invested with the jurisdiction so established was in 1918 the Chief Court of the Punjab, since succeeded by the High Court of Lahore. By s. 2 of this Act the power to grant relief thereunder is limited to cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and the power to make decrees of dissolution of marriage is limited, so far as is at present material, to cases where the marriage shall have been solemnised in India, or the adultery complained of shall have been committed in India. Sect. 10 enacts that for the causes specified therein—which are not altogether the same as the grounds of divorce in England—marriage may be dissolved. There is provision for relief short of divorce in like cases to those in which relief is granted. and s. 7 provides as follows: [His Lordship read the section set out above and continued:] The substantial questions to be decided here are whether the Governor-

General in Council was authorized by the East India Councils Act, 1861, to establish Courts having jurisdiction in India with power to decree dissolution of the marriage of persons domiciled elsewhere, and whether the authority, if any, thereby given to the Governor-General in Council was so exercised in the enactment of the Indian Divorce Act, 1869, as to enable the Chief Court of the Punjab to make decrees of dissolution of the marriage of such persons. Nothing turns in this case upon the words of the Royal Letters Patent, since they merely conferred jurisdiction in general terms "in matters matrimonial." The question at issue depends upon the true construction of the Act of the Imperial Parliament passed in 1861, and the Act of the Governor-General in Council passed in 1869.

My attention was called to three cases decided in this country: *Thornton* v. *Thornton* (1); *Warter* v. *Warter* (2); and *In re Norton's Settlement* (3), in which without argument it was apparently assumed that Indian decrees of divorce between British subjects in India were valid. The material facts of the several cases are not stated in the reports with sufficient fulness to enable me to form any judgment as to the grounds on which the assumption in each instance was made, and no decision was given which is of assistance to me. Sir Erle Richards, however, referred me to a case of *Bannerjee* v. *Bannerjee* (4), in which Sir Lawrence Jenkins, as a judge of first instance, sitting at Calcutta, held that domicil is not a necessary condition of the jurisdiction in divorce conferred by the Indian Divorce Act, 1869. My attention was also called to the chapter on Indian divorce in Mr. Dicey's Treatise on the Conflict of Laws, where that learned writer pronounces himself in favour of the view that the Indian Act does empower, and was intended to empower, the Courts in India to dissolve a marriage though the parties are merely resident within the jurisdiction.

The conclusions so advanced are not founded upon definite affirmative arguments, but appear to rest upon a conviction

(1) 11 P. D. 176.
(2) 15 P. D. 152.
(3) [1908] 1 Ch. 471.
(4) 3 Cal. W. N. 250.

1921

KEYES v. KEYES AND GRAY.

The President.

that the views to which effect was given in our own Court of Appeal in *Niboyet* v. *Niboyet* (1) were in 1869 intended to be carried into legislative operation by the Governor-General in Council. If the judgments of the majority of the Lords Justices in *Niboyet* v. *Niboyet* (1) did correctly declare the law of England on this subject the jurisdiction in divorce could properly—and perhaps ought to—be held in this Court to depend upon the residence of the parties—or at any rate of the petitioner—and not their or his domicil. But this is not so. The authority of *Niboyet* v. *Niboyet* (1) was in effect destroyed by the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier*. (2)

In a matter where the main considerations involved are considerations of international law and of law between State and State in the British Empire, it might well be deemed technically correct to rely, in an English Court exercising jurisdiction in divorce, upon a judgment of the Privy Council. I may add, however, that in the Court of Appeal, and notably in *Bater* v. *Bater* (3), the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* (2) has been held to express the law of England with regard to the question which was dealt with in *Niboyet* v. *Niboyet* (1), and that—apart from any express statutory provision which may exist—the jurisdiction to decree dissolution of marriage depends according to English law upon the domicil of the parties.

So long ago as 1872 Lord Penzance in this Court in *Wilson* v. *Wilson* (4) set forth the main reasons of public policy upon which the judgment in *Le Mesurier* v. *Le Mesurier* (2) proceeds—the mutual interest of communities in questions which affect marriage, the right of each community to determine for itself and to decide by its own tribunals the grounds upon which questions of marriage and of divorce shall depend, and the necessity for some universal rule as to the forum in which the dissolution of a marriage may be decreed. The judgments, collected in *Le Mesurier* v. *Le Mesurier* (2), which illustrate the view that residence may be a ground of

(1) 4 P. D. 1.
(2) [1895] A. C. 517.
(3) [1906] P. 209.
(4) L. R. 2 P. & M. 435, 442.

jurisdiction in divorce, were only referred to in argument before me as affording support for a contention that the Imperial Parliament in 1861, and the Governor-General of India in Council in 1869, might have legislated to give effect to that opinion. Unless they did so legislate, and with effect, the decree made at Lahore at the suit of the present petitioner cannot be upheld.

It is to be borne in mind in considering the question here at issue that in 1861 the law of nations with regard to the power of communities to deal with the status of marriage between strangers resident among them had long been declared by jurists to be that afterwards established in *Le Mesurier* v. *Le Mesurier*. (1) In the opinion pronounced by Lord Westbury on this subject in *Shaw* v. *Gould* (2), Lord Westbury stated it to be one of the rules generally observed by Christian and civilized states that questions of personal status depend on the law of the actual domicil of the party concerned. Lord Westbury in 1868, and Lord Watson in 1895, based their conclusions as to the law prevailing in these islands in the one case, and as to the law in an overseas dominion on the other, upon what they declared to be a well-established principle of the law of nations. And it may be observed that still earlier, in *Warrender* v. *Warrender* (3), Lord Brougham and Lord Lyndhurst had applied the same principle in relation to the law of Scotland. The principles enunciated in *Shaw* v. *Gould* (2) and in *Le Mesurier* v. *Le Mesurier* (1) seem to me to be material in the inquiry whether, upon the true construction of the Imperial Statute of 1861, power is by that statute conferred upon the Governor-General of India in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicil.

At the time of the legislation of 1861 in the Imperial Parliament there was not in India any jurisdiction to decree dissolution of marriage. The despatch in which the Secretary of State, Sir Charles Wood, forwarded to the Viceroy Letters

(1) [1895] A. C. 517. (2) (1868) L. R. 3 H. L. 55, 83.
(3) (1835) 2 Cl. & F. 488, 533.

1921

KEYES v. KEYES AND GRAY.

The President.

Patent under the East India High Courts Act, 1861, for the High Court of Calcutta, refers to this fact, expresses the view that it is expedient that the High Court should have the same jurisdiction in this regard as the Court for Divorce and Matrimonial Causes in England, and requests the Viceroy to take the subject into his consideration, and to introduce into his Council a Bill to deal with the matter. The Bill which was eventually introduced became the Indian Divorce Act of 1869, now under discussion.

Sect. 22 of the Indian Councils Act provides that the Governor-General in Council shall have power "to make laws and regulations for all persons whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the Indian territories under dominion of the Crown." By way of proviso it further enacts that the Governor-General in Council shall not have the power of making "any laws or regulations which may affect the authority of Parliament . . . . or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories." Without this proviso I should have thought it to be clear that the enacting words which I have quoted, reading them in their every-day meaning, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations. No one would suppose, I think, that the legislative authority created by s. 22 could extend to the making of a law which should affect the heritable capacity of a man resident in India in respect of land in England, or control his conduct in any matter of purely English concern. The proviso which I have read could perhaps be used to support an argument based upon the maxim "Expressio unius exclusio est alterius"; but if the terms of the proviso do raise a

question of construction, the result seems to me to be only to refer back the inquiry to the principles on which the construction of statutes depends. A statute must be construed with due regard to its subject-matter and object, and the object of this Act is to provide for the government of India by laws binding upon persons and things in India. As between two possible constructions, that which is conformable to international law as declared in our own tribunals is to be preferred to that which would involve infringement of the rights of other communities.

To create a jurisdiction in divorce such as is exercised in the Courts of this country was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861. That Act, however, does not in my opinion warrant the making of a law to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction. The Indian Divorce Act, 1869, accordingly furnished no sufficient authority for the divorce of the petitioner and the respondent which has been decreed by the Chief Court of the Punjab.

The marriage of the petitioner and the respondent solemnised at Calcutta in November, 1916, is at this time a subsisting marriage; the petitioner is entitled to a decree nisi for its dissolution, and there will be a decree accordingly with costs against the co-respondent.

Solicitors for petitioner: *Boyce & Evans.*

Solicitors for respondent and co-respondent: *Blount, Lynch & Petre.*

The King's Proctor.

Solicitor to the India Office.

J. R. B.

1921
Feb. 8 ;
March 18.

BEFORE THE NAVAL PRIZE TRIBUNAL.

(In Prize.)

THE ANICHAB and Other Craft.

Prize—Droits of Admiralty—Droits of the Crown—Captures by Military Forces—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30).

Enemy property seized as prize by the military forces of the Crown constitutes a droit of Admiralty, and accordingly the proceeds fall to the Exchequer and are not payable into the Naval Prize Fund.

A number of enemy vessels and craft were captured by the military forces of the Crown on the beach in German South-West African ports, and, in the course of the German East African campaign, on the Great Lakes. Both series of captures were held to be good prize (1), and the decision of the Naval Prize Tribunal was now sought by the Exchequer and by the Fleet on the question whether the proceeds of sale constituted droits of Admiralty or droits of the Crown.

Sir Gordon Hewart A.-G. and *Wylie* for the Exchequer. It is conceded by the Fleet that all the captures were made by the military forces, and it follows, according to the principle of the decision in *The Feldmarschall* (2), that the proceeds are droits of Admiralty. Grants in prize have only been made to commissioned captors, captures by non-commissioned captors have always been droits of Admiralty : see Rothery's Prize Droits, pp. 13, 18, 32 ; Story's Principles and Practice of Prize Courts (Pratt's ed.), p. 47 ; and *The Melomane*. (3) Even on a strict reading of the Order in Council of March 6, 1665-6, all the craft in question had been "forsaken by the company belonging to them." (4) In *The Feldmarschall* (2)

(1) [1919] P. 329 ; [1919] P. 83.
(2) [1920] P. 289.
(3) (1803) 5 C. Rob. 41.
(4) This Order in Council is printed in extenso as a note to *The Rebeckah*, 1 C. Rob. 227 at p. 231. The material clauses are as follows :—

"1. That all ships and goods belonging to enemies, coming into any port, creek or road, of this His Majesty's Kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral ; . . . ."

"2. That all enemies' ships and goods casually met at sea, and

the Tribunal decided that joint captures by naval and military forces were partly droits of the Crown and partly droits of Admiralty; it would be a paradox, therefore, if military captures alone constituted droits of the Crown and the proceeds had to be paid into the Naval Prize Fund from which, under the Naval Prize Act, 1918, it is only the naval and marine forces that can derive benefit. [*The Diligentia* (1) was also referred to.]

Sir Reginald Acland K.C. and *Darby* for the Fleet. Primarily all property captured in war belongs to the Crown, and in early times there was no distinction between droits of the Crown and droits of Admiralty. Any person who alleged that prize belonged to anyone else than the King had to show a grant: see *The Melomane.* (2) The statement in that case that the Lord High Admiral has the benefit of all prize taken by persons not commissioned is too wide. None of the captures now in question are droits of Admiralty because they were not captures by vessels and they do not come within the words of the Order in Council of March, 1665-6. The vessels and craft had not come "into any port creek or road" of the Kingdom by "accident or by mistake of port or . . . . ignorance of the war," nor were they "met casually at sea" and seized by non-commissioned vessels. Clause 4 of the Order in Council, relied on by the Exchequer, must be read in conjunction with clauses 1 and 2; it refers to vessels, etc., "forsaken" within the jurisdiction of the Lord High Admiral. The Great Lakes have never been within the jurisdiction of the Lord High Admiral, and an Act 29 Geo. II., c. 27, had to be passed to give the Lord High Admiral jurisdiction for the purpose of holding Courts-Martial: see now s. 46 of the Naval Discipline Act, 1866.

[LORD PHILLIMORE. On the question of locus s. 39 of the Naval Prize Act, 1864, is against you.]

seized by any vessel not commissionated, do belong to the Lord High Admiral."

"4. That all ships forsaken by the company belonging to them are the Lord High Admiral's, unless a ship commissionated have given the occasion to such dereliction. . . . ."

(1) (1814) 1 Dods. 404.

(2) (1803) 5 C. Rob. 41.

1921

THE ANICHAB, ETC.

The Gertruyda (1), in which it was held that the Admiral's rights did not extend to foreign ports outside the dominions of the Crown, and that Dutch ships seized at the Cape of Good Hope, then a Dutch possession, were droits of the Crown, supports the contention that these captures not being droits of Admiralty are droits of the Crown; not necessarily droits that would have been granted to captors, but reserved droits of the Crown which, having regard to the general language of the Naval Prize Act, 1918, would now be payable to the Naval Prize Fund: see also *The Hoogskarpel.* (2)

Wylie in reply. The Order in Council of 1665-6 does not deal with every possible case; "it is not a complete dichotomy": see *The Abonema.* (3) In *The Foltina* (4) the captures in the roadstead of Heligoland, which had surrendered to the British, appear to have been made by the military forces, but they were held to constitute droits of Admiralty. See also *The Rebeckah* (5) and Comyns' Digest, Title "Admiralty—Perquisites of the Admiralty," which include "all goods of the King's enemies taken without commission."

Cur. adv. vult.

March 18. The judgment of the Tribunal (Lord Phillimore, Sir Guy Fleetwood-Wilson and Admiral Sir F. Doveton Sturdee) was delivered by

LORD PHILLIMORE. The first set of vessels to which this part of our judgment refers was captured in German South-West Africa, some on the beach above high-water mark. These were decided to be good prize, while at the same time other vessels found up country were decided not to be good prize, in *The Anichab and Other Vessels.* (6) The second set was captured in German East Africa on the Great Lakes. These were also held to be good prize in the case recorded as

(1) (1799) 2 C. Rob. 211.

(2) Unreported. The facts and the judgments of the Prize Court and the appellate tribunals, so far as ascertainable, are set out in the judgment of Lord Phillimore in *The Feldmarschall* [1920] P. 289 at p. 299 et seq.

(3) [1919] P. 41, 51.

(4) (1814) 1 Dods. 450.

(5) (1799) 1 C. Rob. 227.

(6) [1919] P. 329.

Craft captured on the Victoria Nyanza. (1) The same considerations apply to both sets of cases. It is now agreed that the Fleet had no part in these captures condemned as prize; they were all taken as the result of operations by the military officers of the Crown.

In *The Feldmarschall* (2) we held "that if a case of joint capture should, at any time, be proved before us, that part which ought to be appropriated to the Navy will be a droit of the Crown; but that part which ought to be appropriated to the Army will be a droit of the Admiralty, and, therefore, not a droit of the Crown, and, therefore, will not be directed by us to be paid to the Naval Prize Fund. What the Crown may be pleased to do with the part which falls to the Exchequer as a droit of Admiralty it is not for us to say." In that particular case, the majority of the Tribunal thought it was not a question of joint capture, but Sir Guy Fleetwood-Wilson was of a contrary opinion. The principle was thus established by the unanimous judgment of the Tribunal, though its members happened to have differed as to its application to the particular facts.

It would seem to follow from this decision that if the Army were the sole captors the prize would be a droit of Admiralty and pass to the Exchequer; but an interesting and sustained argument to the contrary was offered on behalf of the Fleet. It was founded on the language of the Order in Council of March 6, 1665-6, which defined the respective rights of the Lord High Admiral and the Crown, it being said that everything not given to the Lord High Admiral by that Order or by the subsequent Order in Council of March 24, 1667-8 (which is for this purpose immaterial), remained in the Crown, and as being droits of the Crown now passed under the Naval Prize Act of 1918 to the Naval Prize Fund, whether it was such a droit of the Crown as would have been granted to the captors under the old Prize Acts or one of the reserved droits of the Crown which neither passed to the captors nor to the Lord High Admiral, the suggestion being that captures by the Army formed one of these reserved droits. The

(1) [1919] P. 83. (2) [1920] P. 289, 304.

1921

THE ANICHAB, ETC.

material paragraphs of the Order in Council are the 2nd and 4th.

It was said for the Fleet that the common expression, used by Sir William Scott, for example, in *The Melomane* (1), that the Lord High Admiral "has the benefit of all prize taken by persons not commissioned" is not strictly accurate. It is to be supposed that the same observation would be made upon the statement by Sir Leoline Jenkins, quoted in Comyns' Digest, Title Admiralty D: "Perquisites of the Admiralty. All the goods of the King's enemies taken without commission, or found, or by accident brought within the Admiralty Commission." The contention is that the conditions requisite for a droit of Admiralty under this 2nd paragraph are that capture should be made at sea and by a vessel, and that these captures were not made at sea nor by any vessel, which is no doubt true.

It will be found, however, that the interpretation put in practice upon this paragraph has not been so restrictive. First as to the supposed condition that the prize must be taken at sea. In *Brown and Burton* v. *Franklyn* (2) in the 10th year of William III. the crews of some English East Indiamen had taken a French vessel stranded on the shore, and great numbers of sequins (3) sewn up in the clothes of the crew who were found on land. Both ship and sequins had been condemned as lawful prize and as a "perquisite of the Admiralty." Lord Mansfield cites this case with approval in *Lindo* v. *Rodney*. (4)

Secondly we have the case referred to by counsel, *The Foltina* (5), where a ship and cargo was seized while lying at anchor in the roadstead of Heligoland, which island had been surrendered to His Majesty's military forces, and where the prize was declared to be a droit of Admiralty. The Report say "His Majesty's forces," but it appears probable that it was the military forces assembled under the command of Lord Cathcart in Stralsund. (See Alison's History of Europe, 1774-1815, vol. viii., c. 51.)

(1) 5 C. Rob. 41.
(2) (1699) Carth. 474.
(3) Referred to in the report as "6000 chequins of foreign money."
(4) (1781) 2 Doug. 612*n*.
(5) 1 Dods. 450.

Lastly, whether these decisions were or were not sufficient to put a construction upon the Order in Council, we have s. 39 in the Naval Prize Act of 1864: "Any Ship or Goods taken as Prize by any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty shall, on Condemnation, belong to Her Majesty in Her Office of Admiralty," a section which is general as to locality.

Now as to the point that they must be captured by ships. Inasmuch as captures by officers of customs and so forth made by detention of vessels in port without the intervention of any ship are droits of Admiralty under para. 1 of the Order in Council, there seems no reason in principle why non-commissioned captors under para. 2 should be limited to vessels, or why these words should not be taken as merely indicating the class of capture. And upon this point we have the authority of Sir William Scott in *The Rebeckah* (1), which has always been taken as the leading authority on the distinction between droits of Admiralty and droits of the Crown.

We quoted in our judgment in *The Feldmarschall* (2) the language on p. 235 of the report of this case where Sir William Scott supposes an attack by fire from the Castle at Dover. But there is an even stronger observation where he supposes a crew from a commissioned ship landing and taking possession of a battery or fort, and by firing from that fort, compelling a ship to strike, and he concludes as follows: "I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally and without any right under their commission, would be a Droit of Admiralty."

The Attorney-General had an answer, which might well, if it were necessary, deserve further consideration. He said that all these vessels were "forsaken by the company belonging to them." According to the language of the 4th paragraph of the Order in Council, such would be droits of Admiralty. He also contended that inasmuch as it can never have been intended to give the Fleet taken as a whole more than the totality of individual captors would have got, we ought to

(1) 1 C. Rob. 227, 236. (2) [1920] P. 289.

1921

THE ANICHAB, ETC.

confine the words "ships and goods captured during the present War" to captures by naval or marine forces. It is difficult, however, to reconcile this argument with the language of Part I., para. 1, of the Schedule, which directs that there should be paid into the Naval Prize Fund all proceeds which would be droits of the Crown without limitation.

However, for the reasons and upon the authorities already given, we follow the principle of the decision of this Tribunal already given in *The Feldmarschall* (1) and decide that these captures by the Army in South-West Africa and on the Great Lakes are droits of Admiralty, and a decree will be drawn up accordingly.

Solicitor for the Exchequer and for the Fleet: *The Treasury Solicitor.*

E. C. M. T.

1921

Feb. 8; *March* 18.

BEFORE THE NAVAL PRIZE TRIBUNAL.

(IN PRIZE.)

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

Prize—Naval Prize Fund—Charges upon the Fund—Sum paid to compromise Claim for Damages—Authority to create Charges on the Fund—Premiums of Insurance—Naval Prize Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 30), *Sch., Part II., paras.* 1 *and* 5.

Under Part II. of the Schedule to the Naval Prize Act, 1918, charges on the Naval Prize Fund include:—

Para. 1: "All expenses (not otherwise recovered) incurred by any Prize Court, or incurred in connection with, or with a view to Prize proceedings . . . . in relation to goods in the custody of the Court . . . . which if condemned would have been droits of the Crown."

Para. 5: "Any other costs, charges, expenses and claims which the tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by Prize Courts, as being costs, charges, and claims which, had there been a grant of prize to captors, captors would have been liable to pay."

In April, 1916, a neutral vessel was seized as prize on the ground that she was engaged in unneutral service. The Law Officers of the Crown advised that on the facts the vessel could not be condemned, and

(1) [1920] P. 289.

eventually a claim for damages amounting to over $170,000, put forward by the charterer, was compromised by a payment of $55,000 and the vessel was released. The decision that the claim must be settled was arrived at before the passing of the Naval Prize Act, 1918, and at a time therefore when no one had any interest in prize money except the Crown, but the actual payment and release of the vessel did not take place until December, 1919, more than a year after the passing of the Act and the promulgation thereunder of the proclamation authorizing the payment of prize money to the Fleet:—

Held, that after the passing of the Naval Prize Act the officers of the Crown would have had no authority to create charges on the fund, and that it would be prudent in future cases to obtain the sanction of the Tribunal to any compromise intended to result in a charge on the fund. As, however, the decision was before the Act and the Tribunal was of opinion that the advisers of the Crown acted rightly in settling the claim the Exchequer was entitled, under para. 5 of the schedule, to be indemnified out of the fund. But as the Tribunal was also of opinion that the amount for which the claim was settled was larger than it would have been if the vessel had been released sooner, the fund ought not to be charged with the whole amount. Accordingly, it would be decreed that the fund should bear one-third and that two-thirds would remain a charge on the Exchequer: *The Oregon*.

Insurances against fire and damage by aircraft were effected by the marshal on the goods of certain neutral claimants under a floating policy covering all ships and cargoes seized in port. The goods, which if condemned would have been droits of the Crown, were ordered to be released and the claimants were held to be not liable for the insurance premiums:—

Held, that the premiums, including the proportionate amounts for the periods between the orders for release and the dates when the claimants took away their goods, were, under para. 1 of the schedule, a charge upon the fund: *The Cairnsmore* and *The Gunda*.

IN these cases the Exchequer sought the decision of the Naval Prize Tribunal on the questions whether sums paid: (*a*) in settlement of a claim brought against the Procurator-General for damages for the wrongful seizure of a vessel as prize: *The Oregon*; and (*b*) in respect of premiums on insurances effected by the marshal, were charges upon the Naval Prize Fund: *The Cairnsmore* and *The Gunda*.

The *Oregon* was a United States vessel under charter to a Mexican subject of German birth. She was seized by a Canadian warship, H.M.C.S. *Rainbow*, on April 23, 1916, and proceedings in prize were instituted against her in the Exchequer Court of Canada on the ground that she was engaged in unneutral service. In March, 1917, the proceedings

1921

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

were transferred to the Prize Court in England. In August, 1917, the Law Officers advised that on the evidence available the ship could not be condemned. The charterer had put forward a claim for damages in respect of loss of earnings, loss on the sale of the cargo and other matters, amounting in all to over $170,000, and eventually in December, 1919, the claim was settled by a payment of $55,000 and the vessel was released.

In *The Cairnsmore* and *The Gunda* insurances in respect of fire and damage by aircraft had been effected by the marshal on the goods of certain neutral claimants under a floating policy covering all ships and cargoes seized in port. On the hearing of the actions for condemnation the goods were found not to have had an enemy destination and they were ordered to be released, but owing to the difficulties of transport the claimants left the goods for a considerable time in the warehouses in which they had been stored. When debited by the marshal with the insurance premiums they declined to pay both in respect of the periods after the dates of the orders for release as well as while the goods were awaiting condemnation, and the Prize Court, and, on appeal, the Privy Council, upheld the contention that they were under no liability to reimburse the marshal. (1)

Sir Gordon Hewart A.-G. and *Wylie* for the Exchequer. On the facts the *Oregon* ought not to have been seized as prize and it was prudent to settle the claim for about one-third of the damages claimed.

[LORD PHILLIMORE. Must not the Tribunal decide for itself whether it was a proper compromise?]

No, the Procurator-General represented all parties, the captors as well as the Exchequer.

[LORD PHILLIMORE. The decision to settle the case was made before the date of the Naval Prize Act and the Procurator-General therefore was only acting for the Exchequer and not for the Fleet.]

If the tribunal has to decide the question, on the evidence

(1) [1920] P. 209; [1921] 1 A. C. 439.

there can be no doubt that the *Oregon* could not have been condemned and there was grave risk that the claim for damages would succeed. The reason the vessel was not released sooner was that it took some time to ascertain the facts—interrogatories had to be administered to the owners and the charterer—and the retention of the vessel in prize acted of course as a powerful lever in negotiating a settlement of the claim for damages. In former times the captor would have been liable for damages in this case, and it follows therefore that a "charge . . . . which captors would have been liable to pay" should fall upon the fund under para. 5 of the schedule.

With regard to the insurance premiums in *The Cairnsmore* and *The Gunda*, these were incurred by the marshal as an officer of the Prize Court in, or in contemplation of, prize proceedings and are charges and expenses which fall directly within the terms of para. 1 of the schedule.

Sir Reginald Acland K.C. and *Darby* for the Fleet. A captor is not liable for damages and costs unless he has acted without justification, or unless subsequent to the capture he has acted vexatiously or improperly: see, e.g., *The Elize* (1); *The Leucade* (2); *The Ostsee.* (3) In all these cases the captor was held liable for his own acts or those of his agents; he is not liable however for the acts of any one else. There was so much suspicion attaching to the *Oregon* that the captain of the *Rainbow* was justified in sending her in for investigation. The subsequent delay in the proceedings, resulting eventually in the release of the vessel, was entirely caused by His Majesty's Government, and the captor would not have been liable for it under the old practice: see *The Zacheman* (4), where the Government was held liable for demurrage and not the captor. Under no circumstances ought the captor to be condemned in damages and costs until he has had an opportunity of defending himself: *The Elsebe.* (5) The captain of the *Rainbow* was not consulted about this settlement at all.

(1) (1854) Spinks, 88.
(2) (1855) Spinks, 217.
(3) (1855) 9 Moo. P. C. 150, 180.
(4) (1804) 5 C. Rob. 152.
(5) (1804) 5 C. Rob. 174.

1921

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

Under these circumstances the sum paid in damages ought not to fall on the Naval Prize Fund.

As regards the insurance premiums, the fund cannot be put in a worse position because claimants do not choose to exercise their rights and take delivery of their goods. In any event therefore the proportion of the premiums for the periods after the dates of the releases cannot be a charge upon the fund. But these premiums are not a charge upon the fund within the meaning of para. 1 at all. The insurances were not ordered by the Court, but, as appears from a letter addressed by the Lords Commissioners of the Admiralty to the marshal on May 9, 1915, were effected by the marshal on the instructions of the Admiralty. It is true that this letter was initialled by the late judge of the Prize Court, Sir Samuel Evans, but this merely shows concurrence and not an authorization to incur the expense on behalf of the Prize Court.

Wylie replied.

Cur. adv. vult.

March 18. The Tribunal (Lord Phillimore, Sir Guy Fleetwood-Wilson and Admiral Sir F. Doveton Sturdee) delivered the following judgments.

THE OREGON.

LORD PHILLIMORE. This vessel was a three-masted schooner of 362 tons with auxiliary engines, flying the American flag, which was seized in the Pacific Ocean by H.M.C.S. *Rainbow* on April 23, 1916, and taken to Esquimalt, where she remained till she was released to her owners in December, 1919.

Her papers when she was seized at sea showed that her registered owners were an American firm, that she had been chartered to one Carlos Linga, described as of Mazatlan, Mexico, under a charter which gave Linga the option of purchase, with entries showing that the whole of the purchase money had been in fact paid though the ship remained untransferred. In the ship's articles it appeared that at one time Linga had been entered on them, probably for convenience on some occasion when he was travelling as a passenger, and on that occasion his place of birth had been stated to be Germany.

The commanding officer of the *Rainbow* had in fact been furnished with information from the British Vice-Consul at Mazatlan to the effect that Linga was a German. It is to be further noted that the *Oregon* carried a powerful wireless installation and a wireless operator. Interrogatories were administered to the American firm and to Linga. The latter said that he had been born in Germany, but had resided at Mazatlan since 1894, had been domiciled in Mexico the whole of that period, and that his partner was a Swede. The captain and certain officers were examined in August, 1916, and no proof was elicited to show that the ship had been engaged in any unneutral service.

On March 16, 1917, the proceedings against the ship were removed from the Exchequer Court of Canada to the High Court of Justice in England in its prize jurisdiction, and in August, 1917, the Law Officers of the Crown advised that the ship would not be condemned. Thereupon negotiations were entered into with the Mexican Government and with Linga, the latter having put forward a claim for $157,200 for earnings, repairs, payments to crew and other incidentals, and a claim for $14,160 in respect of part of the cargo which he owned, of which he received the proceeds, but which he said had been sold at a loss. Eventually both these claims were compromised by the payment of the sum of $55,000 and the ship was released.

The Exchequer now asks the Tribunal to declare that this $55,000 is a charge on the Naval Prize Fund under Part II., para. 5, of the schedule to the Naval Prize Act, and to make an order accordingly. This is resisted by counsel for the Fleet, who submit that the Tribunal is not bound by the compromise, and has to determine for itself under the terms of the Act, whether, according to the principles and practice heretofore observed in Prize Courts, the captors would have been liable to pay this sum, the test being the real existence of such a liability, and not the opinion of the advisers of the Crown that it might exist. On the other hand, it is said on behalf of the Exchequer, that the Procurator-General was the sole representative of all interests, that there must be somebody

1921

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

who can effect a binding settlement, and must be deemed to have authority to compromise, and in substance that his pro tanto admission of liability must be taken to be conclusive as against the fund that such liability existed. It is further said on behalf of the Fleet that even supposing that there was a liability to make some compensation, it either wholly arose from, or was at any rate inflamed by, the fact that there had been unreasonable delay in bringing the prize proceedings to an issue, and allowing the ship to be released; and that this delay was something over which the captain of the *Rainbow* had no control, and for which therefore the Fleet should not be held responsible.

Now it is to be observed that the actual settlement of the compromise took place after the passing of the Naval Prize Act, and the issue of His Majesty's Proclamation granting prize to the Fleet. But the negotiations began before the passing of the Prize Act, and at a time when no one had any interest in prize money except the Crown, and when, therefore, the officers of the Crown were able and indeed bound on behalf of the Crown to make such conditions and arrangements as they might think upon the whole reasonable. It may have escaped notice that after the passing of the Naval Prize Act they no longer had authority to create charges on the fund, and certainly it would be prudent, if any such charges hereafter arise, to apply for the sanction of this Tribunal before any compromise which is intended to effect a charge upon the Fund is entered into. But in this case, at the time when the decisive conclusion was come to that the claim for Prize could not be supported, no interest was vested in the Fleet.

That the ship was not liable to condemnation, and ought not to have been captured, is now reasonably clear. The captain of the *Rainbow* was probably largely influenced by the communication which he received from the Vice-Consul, and no complaint can be made of his action, which was no doubt proper. But inasmuch as Linga had been so long domiciled in Mexico, the Vice-Consul ought not to have suggested that he was German, and the point which the Prize

Tribunal would have had to decide, if the question of costs and damages were brought before it, would not be whether the individual captor had reasonable doubts, but whether there was in fact such a state of things as to afford reasonable ground for the belief that the ship might prove upon further inquiry to be lawful prize.

Two passages from *The Ostsee* (1) may be cited in this connection: "The result of these authorities is that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further enquiry, to be lawful prize. . . . So as to error occasioned by the proceedings of their own Government. The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize Courts afford the remedy as between the individuals, which otherwise must be sought by the Government of the claimants against the Government of the captors; but the mode of proceeding cannot affect the right to redress, and, if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so."

It is not to be forgotten that the ship had the wireless installation, to which Admiral Sir Doveton Sturdee, with his practical knowledge of the subject, attaches considerable importance; but then we also know that the captain and officers were examined with a view to seeing whether there had been any unneutral acts, and that none could be proved.

In the result, we see no reason to think that the advisers of the Crown at the time when they had only the public funds of the nation to consider, made a mistake in admitting, for the purpose of compromise, that there was some liability for some costs and damages to the claimants, in respect of which the Crown must now be in turn indemnified out of the Naval Prize Fund. Indeed, we are inclined to think there was some liability, and that some payment on this account

(1) 9 Moo. P. C. 150, 162, 164.

1921

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

might "reasonably be treated . . . . as a claim which the captor would have been liable to pay."

But when the quantum of this liability is to be ascertained, other considerations arise. The claim before the Tribunal was as large as it was, because the ship was detained so long a time before she was released, and the sum paid by way of compromise must have borne a proportionate relation to the claim. Now if this had been the case of an ordinary captor who had had a grant of prize under the old law, he would in all probability have brought the case to judgment, or have settled the claim much more rapidly. We think, therefore, that the whole of the sum paid by way of compromise cannot "reasonably be treated" as being a claim which under the old practice the captor would have been liable to pay, and we think that only a portion of the sum paid ought to be charged upon the Naval Prize Fund. What proportion ought in strictness to be paid might involve an intricate examination, and one which would cost more than it is worth; and therefore we think that upon this point we may give what was known in the Admiralty as a rusticum judicium, and say that approximately one-third should be borne by the Fund, and two-thirds remain at the charge of the Exchequer.

Accordingly we pronounce that the sum of 4000*l.* is to be charged on the Naval Prize Fund in respect of this matter, and a decree to this effect will be drawn up.

THE CAIRNSMORE AND THE GUNDA.

LORD PHILLIMORE. In respect of the cargoes on board these vessels, a claim is preferred by the Exchequer that certain premiums on policies of insurance, principally against fire and aircraft risk, which were paid by the marshal, should be pronounced to be claims on the Naval Prize Fund, under para. 1, Part II., of the schedule, as being "expenses (not otherwise recovered) incurred by any Prize Court, or incurred in connection with, or with a view to prize proceedings (other than legal expenses) in relation to goods in the custody of the Court which are droits of the Crown or which if condemned

would have been droits of the Crown, whether the same are condemned or are released."

The matter arises in this way. It was first considered by the officers of the Crown that it was inexpedient to effect insurance upon ships and cargoes in custody, the idea being to follow the usual practice in respect of Crown property, which is said to be that the Crown, as any large owner of diversified property, in a business-like manner will be its own insurer. But after a time this policy was changed, and the marshal was directed to insure, and accordingly effected a floating policy covering all ships and cargoes seized in port, and all ships and cargoes seized at sea from the date when the ship arrived in port. This having been done, when a ship or cargo was released, the marshal debited the claimants with the cost of these premiums in the same manner as he might debit them with ship keeping, or warehouse charges. For a long time these debits were paid by claimants without objection, but in the cases of the cargoes of the *Cairnsmore* and the *Gunda*, the claimants resisted payment, and the matter having been brought before the Prize Court it was decided that they were under no liability to repay these premiums, and upon the Crown appealing to the Privy Council this decision was confirmed. (1) It is to be feared that since this decision further claimants will similarly refuse to pay and the Crown will not be recouped in respect of them. This, however, does not mean that those claimants who have paid should be allowed to reopen the matter and claim their payments back; and if any attempt is made in this direction, we think it should be resisted by the Exchequer.

It is contended on behalf of the Exchequer that these were expenses incurred by a Prize Court in connection with prize proceedings, or in any case with a view to prize proceedings. On the part of the Fleet it is said that they were not expenses incurred by the Court or in connection with or with a view to prize proceedings, and that at any rate in the language of the last words of the paragraph, the Tribunal should not direct that they be a charge upon the fund.

(1) [1920] P. 209; [1921] 1 A. C. 439.

1921

THE OREGON; THE CAIRNSMORE AND THE GUNDA.

We are of opinion that they were incurred by the Court. The Court incurs expenses through its officers, and primarily through the marshal who, in these cases, acted under direct authority of the Treasury and the Admiralty, and with the sanction of the judge of the Prize Court. They were properly incurred, first, because the policies would cover losses if any were occasioned by the negligence of the marshal or his officers, as well as those occasioned by pure accident or hostile action, and it was prudent to insure against risks caused by negligence, secondly, because it was prudent to insure against losses occasioned by accident or hostile action, as it would be for the benefit of the fund that such losses should be recouped, and in fact the fund has benefited from this precaution. It appears, for instance, from the correspondence produced to the Tribunal that by March 15, 1916, as much as 100,000*l.* in respect of losses by fire had already been recovered from the underwriters. The marshal, in cases where vessels are proceeded against on the civil side of the Admiralty jurisdiction, is in the habit of insuring, and according to all modern ideas of business would naturally insure ships and goods in his charge as custodian for the benefit of whomsoever it might concern. It was, in our view, clearly for the advantage of those interested in the totality of the prize fund that ships and cargoes which might be decreed to be prize should be so protected.

The claim is limited to ships and cargoes which, if condemned, would have become droits of the Crown, and as to these we see no reason to direct otherwise. In respect of those which would have become droits of Admiralty, there can be no claim upon the Naval Prize Fund.

A further point is then taken on behalf of the Fleet as to the quantum of the sum to be recovered in respect of these premiums, and the Tribunal is asked to direct that a portion shall not be chargeable. It appears that in the particular cases, and probably in many more, the claimants have not been able to find shipping for the conveyance of their cargoes when released, and have left them after judgment in their favour still in the custody of the marshal, and have taken out no instrument of release till they were ready either to reship

the goods, or sell them in this country. It is said on behalf of the Fleet that the premiums for such portions of the time as elapsed after the goods could have been released ought not to be debited to the Naval Prize Fund, and must remain a charge upon the Exchequer. This argument is sought to be fortified by the terms of the letter addressed by the Lords Commissioners of the Admiralty to the marshal on May 9, 1915. Now as to this argument, it is to be observed that no doubt the marshal could have altered his position from the moment that the release of the cargo was decreed, by requiring the successful claimant to take out immediately an instrument of release, and remove his cargo with an intimation that in the alternative he, the marshal, took no further responsibility. But unless and until he did that, his responsibility as officer of the law having legal custody of the goods would continue, or at any rate, would probably be held to continue. In the events which have happened, it would have been wise for the marshal to have taken this course; and the Tribunal is glad to understand that he will take some step of this kind in future, so that premiums after the property has been decreed to the claimants will only continue to be paid at the express request and upon the liability of the claimants.

But as matters stood, it did not occur to the marshal till the decision of the Prize Court, that he ought to have notified the claimants to the effect above mentioned. At any rate he did not notify, and not having notified he remained under liability. It was reasonable and prudent for him to continue keeping the insurance alive until his liability ceased, and we see no reason for directing otherwise.

The premiums, therefore, paid in respect of these two cargoes—namely, 320*l.* 9*s.* 3*d.*, in respect of the *Cairnsmore*, and 589*l.* 14*s.* 9*d.* in respect of the *Gunda*—must be a charge upon the Naval Prize Fund, and a decree will be drawn up accordingly.

Solicitor for the Exchequer and for the Fleet: *The Treasury Solicitor.*

E. C. M. T.

1921
Jan. 12, 13 ;
March 17.

ADMIRALTY.

THE MOGILEFF.

Admiralty—Necessaries—Action in rem—Principal and Agent—Balance of Mercantile Account—Shipowners' Agents' Rights in rem—Admiralty Court Act, 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Admiralty Court Act,* 1861 (24 *Vict. c.* 10), *s.* 5.

Prima facie, persons who have advanced money for necessaries on behalf of a foreign ship are entitled to sue in rem ; and, although it may be inferred from the course of business between the principal and agent that the agent has agreed to look to the personal liability of the principal, and that the advances must be treated as items of a mercantile account to be adjusted in accordance with the terms of the agency agreement between the parties, the mere fact that the plaintiffs are the shipowners' regular agents does not deprive them of their rights in rem under the Admiralty Court Acts 1840 and 1861. The test to apply in each case is whether at the date of the suit the plaintiff could maintain an independent action in assumpsit in the subject matter of the claim.

The Comtesse de Frègeville (1861) Lush. 329 and *El Salto* (1908) 25 Times L. R. 99 considered and explained.

Action in rem for necessaries.

The plaintiffs, the Borneo Co., Ld., carried on business in London and elsewhere as steamship agents ; the defendants, the owners of the steamship *Mogileff*, were a Russian corporation styled the Russian Volunteer Fleet.

According to the statement of claim, between June, 1919, and August, 1920, the plaintiffs at the request of the Volunteer Fleet supplied coals, stores and other necessaries, and made various necessary disbursements for the *Mogileff* at Newport (Mon.) and other ports amounting to the sum of 79,867*l.* 17*s.* The plaintiffs gave credit for sums in respect of freight and discounts amounting to 18,358*l.* 14*s.* 7*d.*, leaving a balance due and owing of 61,509*l.* 2*s.* 5*d.* They claimed judgment for that amount against the *Mogileff*, and, if necessary, an order for her appraisement and sale.

According to the defence, the Russian Volunteer Fleet was a corporation constituted by statute and regulations of the Imperial Government of Russia. At all material times the plaintiffs were the agents of the defendants for the

1921

THE MOGILEFF.

management of the *Mogileff* and other steamers owned by the defendants, the contract of agency being contained in two letters dated March, 1909, between the President of the Russian Volunteer Fleet and the plaintiffs. Under the contract the plaintiffs agreed (inter alia) to supply all coals required by the fleet in the United Kingdom, to pay for coals and necessaries supplied to the steamers of the fleet at all ports between Port Said and Nagasaki, to attend to repairs of the steamers in the United Kingdom, and, in consideration, the plaintiffs were to charge commissions and interest and there was to be a current account between the parties. The agency was terminable by three months' notice on either side, but no notice of determination had been given.

The defendants further said that in June, 1919, the *Mogileff*, then under requisition to the Ministry of Shipping, was delivered to the plaintiffs by the Ministry of Shipping on the terms that she would make a round voyage from the United Kingdom to the East and back, and that out of the profits of that and future voyages the plaintiffs should pay certain expenses incurred by the Ministry of Shipping for repairs to the steamship *Voronej* which also belonged to the defendants. By an agreement contained in letters dated October 4, 7 and 9, 1919, the plaintiffs, in consideration of an assignment to them of the homeward freights, agreed with the defendants to pay all disbursements. On October 7 the *Mogileff* sailed from Newport (Mon.) on the round voyage and returned to London about the middle of August, 1920. To earn the freights assigned to them the plaintiffs paid the disbursements on the voyage, or some of them, and they received the freights. The plaintiffs, in breach of their duty to the defendants, on August 13, 1920, wrongly arrested the *Mogileff* and kept her under arrest, thereby depriving her of earning freight. The defendants denied that any of the disbursements claimed were necessaries supplied by the plaintiffs within the meaning of the Admiralty Court Acts, 1840 and 1861 (1), or that the

(1) Admiralty Court Act, 1840, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . . for necessaries supplied to any foreign ship or sea-going vessel,

1921

THE MOGILEFF.

plaintiffs were entitled to maintain the action. The disbursements, or alternatively, those made before October 4, 1919, were made by the plaintiffs under their agency contract. Alternatively, they were made on the security of the freight to be earned by the *Mogileff* and were made for the benefit of the plaintiffs. They were not made at the request of the defendants or on the security of the *Mogileff*.

In reply the plaintiffs pleaded that the contract of agency relied on by the defendants was not relevant to the present action as none of the disbursements now claimed were made under or in pursuance of that contract. The disbursements were made in respect of the *Mogileff* alone to enable her to prosecute the adventure contemplated at the time of incurring the expenditure, and were made upon the credit of the *Mogileff* in accordance with a verbal agreement between the President of the Russian Volunteer Fleet and the plaintiffs in October, 1919, confirmed in letters exchanged between the parties. In the alternative the plaintiffs alleged that if the disbursements were made on the security only of the freights to be earned by the *Mogileff* (which they denied), the defendants in breach of their contract had failed to pay the freights or some of them to the plaintiffs.

Mackinnon K.C. and *Langton* for the plaintiffs.

C. R. Dunlop K.C. and *A. T. Bucknill* for the defendants.

[The arguments and all the authorities are fully considered in the judgment. Shortly stated, it was contended on behalf of the defendants that the plaintiffs were the regular agents of the defendants, and that they contracted the various liabilities as agents and on the security of anticipated freights. They were bound to pay the creditors to whom they had given orders for the various supplies, repairs, etc., and the creditors

and to enforce payment thereof. . . . ."

Admiralty Court Act, 1861, s. 5: "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. . . ."

looked to them for payment and not to the defendants or the *Mogileff*. As agents, the plaintiffs could not render their account in such a form as to pick out items which were necessaries and sue in rem on those; they could only render it as a balance of a mercantile account for which they could sue in personam but not in rem: see *El Salto* (1) following *The Comtesse de Frègeville*. (2) For the plaintiffs it was contended that the items sued for were undeniably "necessaries"; that a person who advanced money for necessaries must be an "agent"; and that the fact, therefore, that the plaintiffs were the general agents of the defendants was immaterial: *Foong Tai* v. *Buchheister*. (3) In *El Salto* (1) and *The Comtesse de Frègeville* (2) the contracts and the agency agreements precluded the claimants from pursuing their remedies in rem in respect of particular items which came under the category of "necessaries." In the present case there was no agreement between the parties inconsistent with the plaintiffs' right to sue in rem. The assignment of the homeward freights was merely additional security, and the agency agreement did not relate to the *Mogileff* transactions.]

Cur. adv. vult.

March 17. The following judgment was read by

HILL J. This is an action in rem against the owners of the Russian steamship *Mogileff* in respect of a claim for necessaries. The defendants, the owners of the *Mogileff*, are a Russian corporation, styled the Russian Volunteer Fleet. They own a number of steamers. Except so far as interrupted by the war and its consequences, they have carried on business for many years. Their present principal place of business is at Constantinople. The plaintiffs, the Borneo Co., Ld., a British corporation, have for a number of years acted as agents of the defendants in England under an agreement of March 23, 1909, which has not yet been determined.

The claim is for over 60,000*l*. It is not denied that the

(1) 25 Times L. R. 99. (2) Lush. 329.

(3) [1908] A. C. 458.

1921

THE MOGILEFF.

HILL J.

defendants are indebted to the plaintiffs in a very large sum of money. The defence is that the plaintiffs have no right to sue in rem. This is a technical defence, for there can be little doubt that if the plaintiffs had sued in personam they would have obtained leave to serve the defendants out of the jurisdiction and that the defendants would have had no defence to the action except, it may be, as to some details. The defendants are in a difficulty as to payment. They attribute it to the fact that the British Government during the war controlled and operated the greater part of their fleet, and still controls and operates a large part of it and yet has made no payment whatever to the defendants. The plaintiffs agree that that is the position. But that fact cannot alter the legal rights of the parties. If there are moneys owing by the British Government to the defendants, I can only hope that they will be promptly paid so that the defendants may discharge their liabilities to the plaintiffs.

The question for me is whether the plaintiffs are entitled to enforce their claim against the defendants by an action in rem. In the early summer of 1919 the *Mogileff* was one of the ships controlled by the British Government. The British Government released her for a voyage to Vladivostock and back upon certain terms which included the return of the ship to the United Kingdom and the payment to the British Government of the profits of the voyage. The defendants intended to employ the ship in carrying Russian troops and military stores to Vladivostock and hoped for a very profitable cargo home. The plaintiffs shared those hopes. They were disappointed. Vladivostock fell into the hands of the revolutionaries, and the *Mogileff* got no further than Moji. The outward voyage was there broken up, a long delay was incurred, a voyage from Moji to Singapore only covered expenses, and a voyage from Bassein to the United Kingdom was not nearly as profitable as had been expected. In order to fit the ship for the voyage from the United Kingdom to the Far East, extensive alterations had to be made, repairs done and fittings supplied, and wages, coals, provisions, stores, port and harbour dues and the like provided for.

The ship at the end of July, 1919, was placed in the hands of the Cardiff Channel Dry Dock Co. at Newport for the alterations and repairs. She was ready for sea at the end of September. The bill of the Cardiff Channel Dry Dock Co. exceeded 31,000*l.* The defendants were without funds. The plaintiffs found the money to pay the repairers and also for all the other disbursements. Their claim includes moneys paid for wages, stores and provisions, outfit, coals, port charges and similar matters at Newport, and on the outward voyage for coals at Malta and Suez Canal dues and also coals and stores supplied at Singapore. After Singapore outward, for reasons into which it is not necessary to go, the plaintiffs had nothing further to do with the ship or her arrangements and disbursements. Credit is given in the plaintiffs' claim for discounts allowed by some of the material men on the accounts which appear on the debit side and for payments received out of freights. Various items of disbursements since the arrest in August, 1920, are added. It may be a question whether this last group is recoverable as necessaries or as costs, and as to some of the other items, for instance, moneys paid for insurance, there is certainly a question whether they are necessaries supplied to a ship within the meaning of the Admiralty Court Acts. The details of the claim are for the registrar and merchants. But it is apparent that a large proportion of the items in the plaintiffs' claim clearly relate to necessaries supplied to the ship, and that, without them, she could never have been prepared for or prosecuted the intended voyage. Of such a kind in principle are the alterations and repairs, and outfit, wages, stores, provisions, coals, port charges, Suez Canal dues, and so forth, all necessary either for fitting out the ship or for working her. They are in the nature of necessaries supplied to the ship, within the meaning of the Admiralty Court Acts, 1840, s. 6, and 1861, s. 5.

It is well settled that moneys advanced for the procuring of necessaries stand on the same footing as necessaries supplied. See, to go no further back, *The Riga* (1); *The Heinrich*

(1) (1872) L. R. 3 A. & E. 516.

1921

THE MOGILEFF.

Hill J.

Björn. (1) Reference may also be made to Sir Gorell Barnes' decision in *The André Théodore* (2); *The Anna* (3); *The Marianne* (4); and, finally, *Foong Tai* v. *Buchheister* (5), where it is said: "It cannot be questioned that the cases of *The Rio Tinto* (6) and *The Heinrich Björn* (1) amongst others, establish that the person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and, further, that he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced." If therefore the plaintiffs had been in no special relation to the defendants and had been invited to find the moneys they found for the purpose for which they found them, there could be no question, and, indeed, it is not disputed that the plaintiffs could have sued the defendants by a writ in rem served upon the *Mogileff*, and by arrest could have made the ship security for any judgment they might recover in such an action. The defendants, however, contend that this particular remedy is not open to the plaintiffs, and they rely upon the decisions of Sir Gorell Barnes in *El Salto* (7) and of Dr. Lushington in *The Comtesse de Frègeville.* (8) They say that the plaintiffs, being the regular agents of the defendants, incurred the liabilities and made the payments as agents upon the personal credit of the defendants with this addition only, that in October, 1919, the plaintiffs took a charge upon the homeward freights; and they say that by reason of those facts and that relation the plaintiffs have no right under the Admiralty Court Acts to sue in rem.

Before coming to the sections and cases, it is well to warn oneself, as one has often to do in this Court, not to be misled by our habit of personifying the ship. We speak of a ship being to blame, when we mean that some person is guilty of negligence in relation to the ship. We speak of advances

(1) (1883) 8 P. D. 151; 10 P. D. 44; 11 App. Cas. 270.
(2) (1904) 10 Asp. M. L. C. 94.
(3) (1876) 1 P. D. 253.
(4) [1891] P. 180.
(5) [1908] A. C. 458, 466.
(6) (1884) 9 App. Cas. 356.
(7) 25 Times L. R. 99.
(8) Lush. 329.

1921

THE MOGILEFF.

Hill J.

to a ship, when we mean that money is lent for ship's purposes to some person who becomes liable as debtor. It is convenient to speak in brief of advances made upon the credit of the owner as advances made upon the credit of the ship. But it is an essential element of all actionable claims for necessaries that there should be a debtor, liable in personam. This personal liability may or may not be enforceable by proceedings in rem against the ship. But a proceeding in rem is only machinery for enforcing a right in personam. There is no such thing in a necessaries case as an advance upon the credit of the ship detached from the credit of some person who is personally liable as debtor. As was said by Lord Watson in *The Heinrich Björn* (1): "The whole provisions of the Act 3 & 4 Vict. c. 65 appear to me to relate to the remedies and not to the rights of suitors. . . . That enactment enables every person having a claim of the nature of one or other of those specified in s. 6 to bring an action for its recovery in the Admiralty Court, but it cannot in my opinion have the effect of altering the nature and legal incidents of the claim." Before any one can sue in rem for necessaries, there must be a debt presently due to the plaintiff in respect of the necessaries which are the subject of the claim. One who supplies to a ship, upon the order of the master, necessaries which it is not within the actual or apparent authority of the master to order on the credit of the owner, has no right to recover against the owner by any proceedings whether in personam or in rem. A repairer who repairs the ship or a tradesman who supplies stores upon terms of a deferred payment—e.g., by taking a six months' bill—has no right to recover in either form of action until the agreed period of credit has expired. If he has bargained to be paid not in cash but in kind or by a set-off, he cannot recover at all except upon the special contract. These are only illustrations of the principle that you cannot sue in rem for necessaries unless at the date of the suit you could maintain an action of debt in respect of the very subject matter of your claim. I believe that this principle will

(1) 11 App. Cas. 270, 278.

1921

THE MOGILEFF.

Hill J.

furnish the test to determine when the agent of the owner can, and when he cannot, sue his principal by proceedings in rem.

It is clear that the mere fact that the plaintiff is an agent of the owner does not deprive him of a right to sue in rem. The sections contain no such limitation. As Dr. Lushington as long ago as 1859 said in *The West Friesland* (1): "There is nothing in the Act to exclude agents from suing, and nothing in the relation itself, apart from positive law. . . . ." In recent times, much more than in Dr. Lushington's day, the most usual way for necessaries to be supplied to a ship elsewhere than in the home port is upon the credit of the ship's agent, acting either upon general instructions or upon specific authority of the owner. Such method of supply has taken the place of bottomry, greatly to the advantage of shipowners. The agents of foreign owners are ready to pledge their credit for necessaries because they know that they can secure repayment from the owner not only by proceedings in personam but also by proceedings in rem. In modern times actions in rem in this Court for necessaries have more often been brought by ship's agents than by any other class of necessaries men. Instances of claims by agents of the owner are to be found in the following: *The Afina van Linge* (2); *The Soblomsten* (3) (Messrs. Donner's claim); *The Underwriter* (4); *The Panthea* (5); *The Riga* (6); *The Anna* (7); *The Heinrich Björn* (8); and *Foong Tai* v. *Buchheister*. (9)

There is nothing in the mere relation of principal and agent as between owner and agent which prevents the agent who has found money for the supply of necessaries to a ship from suing the owner, his principal, by a writ in rem and arrest of the ship to which the necessaries have been supplied. But there are cases in which it has been held that an agent could not sue in rem. *El Salto* (10) was such a case. It is very

(1) (1859) Swa. 454.
(2) (1859) Swa. 514.
(3) (1866) L. R. 1 A. & E. 293.
(4) (1868) 1 Asp. M. L. C. 127.
(5) (1871) 1 Asp. M. L. C. 133.
(6) L. R. 3 A. & E. 516.
(7) 1 P. D. 253.
(8) 10 P. D. 44.
(9) [1908] A. C. 458.
(10) 25 Times L. R. 99; Shipping Gazette, November 2, 23–5, 1908.

shortly reported in the Times Law Reports. A full report of the judgment appears in the Shipping Gazette. *El Salto* was one of five steamships owned by a Spanish company. The plaintiffs who carried on business in London and Bilbao entered into an agreement with the owners in 1903 whereby the plaintiffs were to open a credit for ship's disbursements and were for a commission to do all the business of "insurance, sale or purchase of steamers and chartering or coaling of steamers owned or which may be owned by the Company." The agreement was terminable by three months' notice, and it continued: "Of course, when terminated, the amounts outstanding to the credit will forthwith be refunded by the Company." This last is spoken of by Sir Gorell Barnes as a material clause. In course of time the amount of the credit was increased and the advances of the plaintiffs included other matters than ships' disbursements, and among them a large sum of money found for payment of debenture interest or the taking up of debentures issued by the company. In June, 1908, the plaintiffs declined to go on and no further advances were made except to wind up current business, and the account was finally closed in October. It included items amounting to 1000*l.* for coal supplied to *El Salto* between April and the closing of the account—the precise dates do not appear. The debit balance on October 29 was 13,699*l.* It had been 14,841*l.* on April 1. The plaintiffs had brought an action in the King's Bench Division to recover the balance and obtained judgment for a large amount with liberty to the company to defend as to the residue. They now sued in rem for the items representing coal supplied to *El Salto*. Sir Gorell Barnes held that they could not maintain that action. He said: "I feel myself bound by authority in this case, as soon as I come to the conclusion, as I do, that the claim I have to consider is really based upon a general mercantile account between the parties and I am satisfied that that is the true view to take of the case, given the provisions of the agreement between the parties. It is to be noted that the agreement was to be terminated by three months' notice on either side,

1921

THE MOGILEFF.

Hill J.

which is practically what was done in this case, 'and of course when terminated the amount standing to the credit will forthwith be refunded by the Company.' That is to say, the arrangement was that the account was to be treated as a whole from first to last. When it came to an end, the balance was to be refunded to the plaintiffs, but the whole course of business shows it was dealt with as a whole from beginning to end." He then says that Dr. Lushington in *The Comtesse de Frègeville* (1) had a very similar case before him, and he quotes Dr. Lushington's judgment, refers to *The Underwriter* (2) and *Foong Tai* v. *Buchheister* (3), and says that *The Comtesse de Frègeville* (1) decides the matter. Now here it will be observed that the ratio decidendi is that by the bargain and course of business between the parties, the account was to be treated as a whole, and the credit continued until the termination of the agreement and then the balance was to be refunded. There was no immediate right upon the supply of the coals to be paid for them, there was no right at any time to be paid for the coals as a separate item of debt. Sir Gorell Barnes speaks of *The Comtesse de Frègeville* (1) as a very similar case. That case was one of many necessaries claims decided by Dr. Lushington. There is no subject upon which Dr. Lushington more often spoke with different voices. He hovered between the opinions that the sections created a maritime lien and that they merely provided a remedy and gave the Court jurisdiction: see the cases discussed in *The Heinrich Björn.* (4) At one time he was ready to give the sections a liberal interpretation; at another he was inclined to treat them as merely restoring to the Admiralty Court the jurisdiction which before *The Neptune* (5) it had exercised over the claims of those who were material men in the strict sense. Contrast *The Alexander* (6), where he adopts the test laid down in *Webster* v. *Seekamp* (7), with the first half of the judgment in *The Comtesse de Frègeville.* (1) And in my view it is very difficult

(1) Lush. 329.
(2) 1 Asp. M. L. C. 127.
(3) [1908] A. C. 458.
(4) 10 P. D. 44; 11 App. Cas. 270.
(5) (1835) 3 Knapp P. C. 94.
(6) (1842) 1 W. Rob. 346, 361.
(7) (1821) 4 B. & Al. 352.

1921

THE MOGILEFF.

Hill J.

to reconcile the second half of that judgment with Dr. Lushington's decision in *The West Friesland* (1) two years before, though it agrees with words used by him in *The Onni* (2) (Seymour, Peacock & Co.'s claim) one year before. I will examine these cases in order of date.

In *The West Friesland* (1) the facts appear fully in the judgment in the Privy Council in Swabey, and, under the title of *The Twentje*, in 13 Moo. P. C. (1) The plaintiffs were the agents in England of the owners of the ship which traded between London and Holland; they collected freights and paid expenses and rendered voyage accounts. These accounts included items for coals on six different voyages between June 20 and August 4, 1856. In the Privy Council it was held that the plaintiffs had no claim in rem in respect of the coals, because in respect of those items they had been satisfied by payment in account. They were attempting to sue in rem for a general balance of account, when the necessaries items in the accounts had already been satisfied by payment. But Dr. Lushington, before whom the point about payment does not seem to have been argued, admitted the claim and that too in a case in which he was treating the section as creating a maritime lien. In *The Onni* (2) (Seymour, Peacock & Co.'s claim), the plaintiffs made advances to the owner to clear off a bottomry bond and were to outfit the ship for a new voyage, negotiate a charterparty, and receive the freight. Other claimants having appeared, the plaintiffs declined to go on and sued in rem for necessaries, claiming the balance of the bond paid by them, and some other advances. The action was by default. Dr. Lushington rejected the claim: "The bulk of the claim is for money advanced to pay off a bottomry bond; money advanced too upon a mercantile account, and a mercantile speculation. I do not feel myself at liberty so to enlarge the construction of a statute intended only to secure payment for necessaries furnished upon emergency." This is the first case in which Dr. Lushington distinguishes a "mercantile account." This view is developed in the following year in *The Comtesse*

(1) (1859) Swa. 454; 13 Moo. P. C. 185. (2) (1860) Lush. 154, 157.

1921

THE MOGILEFF.

Hill J.

de Frègeville. (1) In that case the plaintiffs were agents for the owners and acted as brokers to the ship, in which capacities they received the freights on cargo delivered in London and paid the dock dues, pilotage, clearance and other charges connected with the vessel; they also paid for coals supplied to the vessel by direction of the master, to enable her to leave the Port of London. They claimed a balance of their account. Dr. Lushington rejected the claim. He did so first of all on a narrow interpretation of the statute: "I shall hold that necessaries means primarily indispensable repairs—anchors, cables, sails, when immediately necessary; and also provisions; but, on the other hand, does not include things required for the voyage, as contradistinguished from necessaries for the ship. Were I to hold otherwise, I might be led into allowing expensive outfits, and expenses of many kinds, far removed from any proper meaning of the term 'necessaries'—indeed, some articles for speculative purposes, outfit for passengers, accommodation for troops or special cargoes." This view is clearly inconsistent with earlier and later decisions and the distinction between necessaries for the ship and necessaries for the voyage was dissented from by Sir Robert Phillimore in *The Riga* (2) and has never since been treated as sound. But Dr. Lushington continued: "The present suit is brought by Messrs. Thompson & Co. under the following circumstances. They state that they were the agents of the owner of the vessel arrested, and also the brokers, that as such agents they received the freights, and paid dock dues, and other charges in 1860; that, in addition, they paid 186*l.* for coals supplied to enable the vessel to leave London. An account is annexed, and this is a suit for the balance of that account. This is in fact an account between shipowner and agent; all the business was done by the plaintiffs as agents; the moneys were so advanced, and so received; and the moneys received were sufficient to pay all necessary expenses, unless the coals are to be so considered, the vessel arrested being a steam vessel. In one sense, no doubt, coals are necessaries for a steam vessel,

(1) Lush. 329, 332, 333. (2) L. R. 3 A. & E. 516.

and there are cases in which I should probably hold them so to be. But in my judgment, the arrest of the ship for the payment of the balance of an account of this description, was not contemplated by the statute; the statute looks to an immediate necessity, not to the liquidation of a mercantile account, where credit is given by the agent in the ordinary course of business. If I entertained this case, this Court might have to settle accounts between merchant and agent to an unlimited extent. I cannot so construe the statute." Unless there was something in the agreement of agency which does not appear in the report, I find it quite impossible to reconcile the view there expressed with the view expressed by Dr. Lushington in *The West Friesland*. (1) Indeed *The West Friesland* (1) was a much stronger case of a "mercantile account." I confess that upon the facts reported the case would appear to be an ordinary one of advances by ship's agents for necessaries, and the decision inconsistent with the line of authorities I have already referred to. But it has been treated as an authority for something different. Sir Gorell Barnes speaks of it as a case very similar to *El Salto*. (2) In *The Underwriter* (3) Sir R. Phillimore quotes Dr. Lushington and says: "If the evidence had established that this suit was brought to recover the balance of an account, or in order to obtain a general balance of accounts, I should hold that I was bound by the decisions of the Privy Council in *The Twentje* which was an appeal from the decision in *The West Friesland* (1) and by the decision of my predecessor in *The Comtesse de Frègeville* (4) to hold that this Court had no jurisdiction to entertain the suit."

Regarded as in the same class in respect to facts as *El Salto* (2) or *The West Friesland* (1) in the Privy Council, *The Comtesse de Frègeville* (5) presents no difficulty. I think that it may well be so regarded. The two parts of the judgment ought to be taken together. Dr. Lushington had ruled out all the items except coals as not being necessaries;

(1) Swa. 454; 13 Moo. P. C. 185.
(2) 25 Times L. R. 99.
(3) 1 Asp. M. L. C. 127, 128.
(4) Lush. 329, 332, 333.
(5) Lush. 329.

1921

THE MOGILEFF.

Hill J.

the plaintiffs had collected freights; on the whole account there was a debit balance of 81*l.*; and the account rendered may have been in such form that the plaintiffs could not say that the coals had not been paid for by the freights collected. If so the case was on all fours with *The West Friesland* (*Twentje*) (1) and the distinction between it and *The Underwriter* (2) is understandable. For, in *The Underwriter* (2), the plaintiffs were agents of the owners, having had large transactions with them in respect of other vessels. They made advances for payment of repairs to *The Underwriter* and for other necessaries. They collected freights which were sufficient to pay for the ordinary disbursements but not for the repairs. They were held entitled to sue in rem for the unsatisfied balance of their account. Sir Robert Phillimore says: "The accounts which have been put in show that the plaintiffs acted as brokers and agents in the matter of several ships, and that they forwarded debtor and creditor accounts, acting, in fact, as general agents. It appears to have been their habit to send in, not only particular accounts for each ship, but, at stated periods, general accounts for all the ships for which they were agents or brokers." He then cites *The West Friesland* (1) and *The Comtesse de Frègeville* (3) in the passage I have already quoted and continues: "But the present case is materially distinguished from these cases. This suit is instituted, not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessaries required by the exigencies of the ship, and without which she could not have prosecuted her voyage."

The last case I shall refer to is *Foong Tai* v. *Buchheister*. (4) In that case, the plaintiffs (respondents) were employed as agents by one Baessler to purchase a ship in England and to make advances for her disbursements on a voyage out to China The claim was brought under s. 5 of the Admiralty Court Act, 1861, as applied to Shanghai. The plaintiffs had been paid the

(1) Swa. 454; 13 Moo. P. C. 185.
(2) 1 Asp. M. L. C. 127.
(3) Lush. 329.
(4) [1908] A. C. 458, 461, 468.

purchase price and had in part been satisfied in respect of their advances out of the outward freight, but there was a balance due to them in respect of these advances. Their claim is described in the Privy Council judgment as "for repairs done to, stores and equipment provided for, and disbursements made on account of the above mentioned vessel at certain ports in England, at Shanghai, and at Port Said, Aden, Colombo, Singapore and Hong Kong, at which latter ports she called on a voyage from Cardiff to Shanghai." The Court had found that some of the items in the plaintiffs' claim were in the nature of necessaries and gave judgment for the plaintiffs. This judgment was affirmed by the Privy Council. There were other questions in the case turning on the rights of beneficial owners of a ship. For the present purpose the point lies in the contention against the claim that "the plaintiffs' claim was not in reality a claim for necessaries within the meaning of s. 5, but merely a claim for the balance of an ordinary mercantile account." The judgment thus deals with that contention: "It remains to consider the first contention, namely, this—that the plaintiffs sue, not for necessaries, but for the balance of an ordinary mercantile account. The accounts furnished to Baessler are printed in the record from pp. 9 to 21 both inclusive. They are solely concerned with one ship, the *Draco*, and with disbursements made for her in one adventure, her voyage from Cardiff to Shanghai. Those dealing with expenditure at the several ports of call and at Shanghai do not contain a single credit item. They are little more than lists of items of disbursements. It is only in account A—the account dealing with the expenditure in England before the vessel sailed—that credit items are to be found and a balance is struck. Two of these credit items are for sums of 4000*l.* and 1000*l.*, obviously the purchase money of the ship received and paid over before any expenditure had been incurred. The remaining credit item is 813*l.* 13*s.* 6*d.* (four-fifths of the freight to Singapore) paid in England on February 23, less deductions, leaving a balance of 414*l.* 13*s.* 8*d.* which balance the plaintiffs paid Palmer & Co." [Palmer & Co. were the plaintiffs' agents in

1921

THE MOGILEFF.

Hill J.

England.] "No accounts, therefore, have been rendered in this case which in fact resemble ordinary mercantile accounts. But on an examination of the authorities to which their Lordships have been referred, and especially of the cases of *The Twentje* (1) and *The Underwriter* (2), it will be found that what they really decide is this—that, as necessaries supplied to a ship are prima facie presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners (*The Perla* (3)), the form in which accounts are rendered by an agent, who has supplied or paid for necessaries, to his principal is evidence to rebut that prima facie presumption and shew that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent from suing for necessaries under s. 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received. In the case of *The Underwriter* (2), the governing consideration on which the judgment of Sir Robert Phillimore in favour of the plaintiff turned was this—that there, as here, the suit was instituted, 'not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessaries required by the exigencies of the ship and without which she could not have continued her voyage.' Their Lordships think that the form in which the accounts were furnished in this case affords no evidence that the plaintiffs intended to look to Baessler alone for repayment of the large sums advanced by them, and that even if it did afford such evidence, that evidence is outweighed by the other evidence in the case." The decision emphasises the view that prima facie an agent who has paid for necessaries is entitled to sue in rem. But it recognizes that there are cases in which it may be inferred from the course of business between the principal and agent that the agent has agreed to look to the personal liability of the principal alone, and has lost the right to sue the principal by proceedings in rem.

(1) 13 Moo. P. C. 185. (2) 1 Asp. M. L. C. 127. (3) (1857) Swa. 230.

I believe the test to be the same as that which applies to other claims for necessaries. The agent, by his agreement of agency, as in *El Salto* (1) or by the way the accounts have been dealt with, as in *The Twentje* (2), may be in a position in which he cannot say that he has a present right of action at all for the items of necessaries as a separate and distinct cause of action, and if he has no such immediate and independent right of action in assumpsit, he cannot enforce that which he has not got by proceedings in rem.

I apply these considerations to the facts of the present case to see whether there is anything to deprive the plaintiffs of their prima facie right to sue in rem. I can find nothing. The agency agreement does not relate to advances such as were made in respect of the *Mogileff*. The *Mogileff* transactions are outside the business contemplated by the agreement. The agreement does not provide for any open credit, except in connection with captain's drafts. There were no captain's drafts in this case. The agreement does not, as in *El Salto* (1), provide for a final adjustment of accounts on the termination of the agency and payment of the balance then ascertained. If these transactions are within the agreement at all, the agreement provides for payments once a month, and the month had expired long before the writ was issued. There was no course of business in such transactions as the present, and therefore no agreement can be inferred from any course of business. The plaintiffs made the advances under no obligation arising out of the agreement or course of business, but at the request of the defendants. As to accounts, the rendering of accounts had ceased after the first revolution in Russia. After the date of the writ and arrest, accounts were asked for and were rendered. They are in form accounts current, and those which were produced contain debit and credit items relating to two other ships besides the *Mogileff*. But the writ had already been issued and the *Mogileff* arrested. How then can it be said that they are any evidence that the plaintiffs had agreed to forego their right to sue in rem ? But apart from negative evidence,

(1) 25 Times L. R. 99. (2) 13 Moo. P. C. 185.

1921

THE MOGILEFF.

Hill J.

there is positive evidence that the plaintiffs were zealous to preserve their remedy in rem. They threatened to prevent the *Mogileff* leaving Newport unless they were secured, their intention being to let the repairers hold the ship under their possessory lien, and they only paid the repairers and sent the ship to sea and made the subsequent advances, after they had been assured on October 4, 1919, by the defendants' representative, Gherasimoff, that he would give them the freight and the ship as security, and had obtained the letter of October 4, 1919, which (with the letters of October 7 and 9, 1919, supplemented by the letter of November 11) embodied the terms agreed on October 4. These terms not only charged the freight, but guaranteed that the *Mogileff* should return to the United Kingdom and should not be sold or transferred or mortgaged while any of the advances remained unpaid. It was contended that in stipulating for the return to the United Kingdom the plaintiffs were only thinking of the promise made to the British Government. I see no reason to suppose that the plaintiffs were not also aiming at their own protection, as in the stipulation against mortgaging they certainly were. It was contended that, in taking a charge upon the freight, they showed an intention to forego any right against the ship. I see no reason for any such view. They were only getting all the security they could. The defendants sought to draw a distinction between advances made before and after the letters of October. It does not help them. The letters of October may strengthen the plaintiffs' case; but, apart from the letters, the advances before and after October were made for necessaries at the request of the defendants.

There was some discussion as to whether the plaintiffs made themselves personally liable to the Cardiff Channel Dry Dock Co. in placing the order in July, 1919. It is quite immaterial. If they did, the subsequent payments were in discharge of a liability incurred by them at the defendants' request; if they did not, the subsequent payments were equally made at the defendants' request for necessaries and in pursuance of the agreement of October. It would, however,

1921

THE MOGILEFF.

Hill J.

have surprised the Cardiff company, as I should think, if in 1919 they had been told that they were giving credit to the Russian Volunteer Fleet and not to the Borneo Co., Ld.

So far from the defendants displacing the prima facie right of the plaintiffs to sue in rem, the evidence as a whole shows that the plaintiffs were careful to preserve their right, and to secure that the *Mogileff* should be available for its exercise.

I therefore give judgment for the plaintiffs with costs, and there will be an order for a reference to the registrar and merchants to ascertain the amount.

Solicitors for the plaintiffs : *Downing, Handcock, Middleton & Lewis.*

Solicitors for the defendants : *Thomas Cooper & Co.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

C. A.

1921

Jan. 31 ; *March* 21.

THE IBIS VI.

Admiralty—Practice—Costs—Allowances to Witnesses—Measure of Compensation for Detention—Detention of Expensive Witnesses—Examination on Commission—Party and Party Costs—Order LXV., *r.* 27.

While it has always been the practice, owing to the nature of their calling, to allow seafaring witnesses to be detained on shore to give evidence, and to allow them reasonable compensation for their detention, it is a question for the taxing master whether a party who seeks to charge his opponent with the cost of detaining an expensive witness has acted reasonably in incurring the expense or whether he ought not to have examined the witness on commission.

(Per Younger L.J.). The statement in the books on Admiralty Practice taken from the headnote to *The Karla* (1864) Br. & Lush. 367, that "a party is not bound to examine a witness before the trial," is too general. The statement, as appears from the report, had reference only to foreign witnesses called by defendants.

A taxing master should bear in mind that a witness duly summoned is bound to attend, and the witness is not entitled to receive, as the measure of his compensation, the exact sum he may prove he has lost by reason of the detention. He is however entitled to some compensation,

C. A.
1921
THE IBIS VI.

and not merely to the conduct money given him with his subpœna; and the wages he is earning may afford an important indication of what is fair compensation. But (per Younger L.J.), although this is correct in the case of seamen, as regards captains and other officers, as in the case of professional witnesses, their earnings cannot be taken as a fair criterion on which to base the allowance.

The mate of the plaintiffs' fishing trawler, detained ashore for twenty-five days to give evidence in a collision action, was prevented from sailing on a fishing voyage on which he would have made 280*l.* 11*s.* 5*d.* as his share of the catch. The plaintiffs succeeded in the action and paid the witness this sum. The assistant-registrar allowed the item in the plaintiffs' bill of costs as chargeable against the defendants:—

Held, reversing the decision of Duke P., who affirmed the order of the assistant-registrar, that the compensation had been assessed on a wrong principle, and that the case must go back to the assistant-registrar for reconsideration.

APPEAL from Sir Henry Duke P. affirming an order of the assistant-registrar.

The plaintiffs, the owners of the trawler *Port Jackson*, brought an action against the owners of the trawler *Ibis VI.* to recover damages for injuries caused by collision. The mate of the *Port Jackson* was detained ashore to give evidence at the trial from November 8, 1918, to December 3, 1918. The plaintiffs recovered judgment in the action and subsequently agreed the damages at 300*l.* Some time after the judgment they paid the mate 280*l.* 11*s.* 5*d.* as compensation for his detention. The mate had agreed to sail on a Belgian trawler, and was to be remunerated by a share of the catch, and the sum paid was the amount received as his share of the fishing voyage by the man who took the mate's place. The plaintiffs then carried in their bill of costs against the defendants, including this sum as chargeable against the defendants, and the assistant-registrar allowed the item. The defendants appealed to the President, who affirmed the order, and gave leave to appeal.

Stranger for the defendants. There was no legal obligation on the plaintiffs to pay the witness the sum he alleged he had lost by being detained ashore, and they ought to have made some agreement with him. The fact that another man acting as his substitute made a large sum is too remote and should not have been taken into account. At the most all that the

witness was entitled to was the ordinary remuneration during the period of his detention applicable to a witness of his class. The wages of an engineer or a trawler of the description of the *Port Jackson* were about 1*l.* a day, and an engineer and a mate would rank about equally according to the ship's articles, the engineer probably being a little the superior. But, as a witness under subpœna to give evidence, the mate was bound to attend the trial, and all that he was legally entitled to was conduct money and expenses. He could not have sued the plaintiffs for damages for the loss he sustained, and if therefore the plaintiffs chose to pay him they cannot charge the amount to the defendants.

Dumas for the plaintiffs. The test to apply in calculating the remuneration to be given is what the witness could reasonably expect to have earned.

[LORD STERNDALE. Was it reasonable to detain the witness at such enormous expense? Ought he not to have been examined on commission?]

The point was not taken in the Registry. It was admitted that the plaintiffs had a right to detain him for the trial, he was a most important witness: see as to the Practice, Roscoe's Admiralty Practice, 4th ed., p. 424, and Order LXV., r. 27.

[WARRINGTON L.J. referred to *The Bahia*. (1)]

Costs are in the discretion of the taxing master. The assistant-registrar had all the facts before him and exercised his discretion, and as the damage suffered by the witness afforded a very good criterion of the remuneration he ought to receive, awarded him that sum. The plaintiffs paid the witness that sum, and the amount was rightly chargeable against the defendants.

Stranger replied.

Cur. adv. vult.

1921. March 21. The following judgments were read:

LORD STERNDALE M.R. This is an appeal from the President of the Probate, Divorce, and Admiralty Division affirming an order of the assistant-registrar. The facts are as follows.

(1) (1865) L. R. 1 A. & E. 15.

C. A. 1921

THE IBIS VI.

Lord Sterndale M.R.

[His Lordship stated the facts and continued.] The allowances to other witnesses were as follows: the steward was allowed 13*l.* 9*s.* for 11 days' detention; the master was allowed 21*l.* for 3 days; the chief engineer was allowed 23*l.* 14*s.* 10*d.* for 27 days; and the deck hand was allowed 3*l.* for 3 days. These amounts work out approximately at the following daily rates: The steward 25*s.*, the mate 11*l.* 4*s.*, the master 7*l.*, the chief engineer 17*s.* 6*d.*, the deck hand 1*l.* It will be noticed that the mate is enormously higher than anybody else.

The amount paid to this witness as compared with the amount of the damages is no doubt startling, but to a certain extent it is due to the startling gains which were made by some persons during the progress and by reason of the war.

The witness had taken an engagement as mate of a Belgian trawler and was to be paid, as masters and mates of trawlers often are, by a share of the catch. One consequence of the war was that the value of the catch had appreciated enormously, and it was proved, by evidence which satisfied the assistant-registrar and the President, that persons paid by shares in the catch were at the material time earning remuneration far out of proportion to anything they had earned before the war. It was also proved to the satisfaction of the assistant-registrar and the President that the witness if not detained for the purposes of the trial would have sailed on November 9, 1918, as mate of the trawler *J. Baels Maurieux;* that in consequence of his being detained and unable to sail, another mate was engaged in his place on the same terms, and that the share received by that mate was the sum of 280*l.* 11*s.* 5*d.* The witness therefore in fact lost that sum, and the questions which arise are: (1.) Were the plaintiffs bound to pay him that sum? (2.) If so, can they charge it against the defendants as part of the costs of the action?

I think we must accept the facts as proved before the assistant-registrar and the President, and indeed they were not challenged before us.

The question of the detention of witnesses for the purpose of giving evidence is of greater importance in the Admiralty

C. A. 1921

THE IBIS VI.

Lord Sterndale M.R.

Division than in any other Division of the High Court, though the rule upon the matter, Order LXV., r. 27, applies to all Divisions, and expert nautical witnesses have always been treated rather differently from others. In the other Divisions the witnesses are generally in this country, and can return to or remain in their ordinary avocations until a very short time before the trial, when they can be summoned either by notice or by subpœna, and are readily available. There is also a scale of allowances to witnesses which, modified by the discretion allowed to the taxing master, works on the whole quite well, though not always to the satisfaction of the witnesses. In the Admiralty Division the position is quite different. If nautical witnesses are allowed to join their ships and resume their ordinary avocations the chances of their being able to be present at a trial on a date to be fixed in the future are small, and it has therefore always been held permissible to detain them on shore and to pay them proper compensation for such detention, and the amount of the compensation has been considered as an expense or cost of the action. This was laid down as long ago as 1857 in *The Olive* (1), where Dr. Lushington pointed out that the rules of other Courts as to witnesses did not apply to such a detention. It has always been considered that the rate of wages which the witness was earning at the time is an important factor in ascertaining the proper amount of compensation, and generally the course is taken of paying him for the period of detention at the rate of his wages. See Roscoe's Admiralty Practice, 4th ed., p. 424. The rate of wages is however not an absolute measure, but a valuable guide.

The actual amount of compensation is fixed by the registrar, and I think this long-continued practice raises an implied contract on the litigant who detains a witness without further bargain to pay the compensation fixed by the registrar. It was argued in this case that the plaintiffs ought to have made a special bargain with the witness, but I am not at all satisfied that they could have made such a bargain, at any rate to pay a less sum than the registrar might fix.

(1) (1857) Swa. 292.

C. A. 1921

THE IBIS VI.

Lord Sterndale M.R.

The plaintiffs cannot charge against the defendants more than they themselves were bound to pay to the witness. I think the circumstances of the payment in this case might throw some doubt on the payment being made in consequence of such a liability, but I take that as decided in the plaintiffs' favour by the assistant-registrar, a decision which we must accept.

Whether the litigant paying that sum can recover it as costs from his defeated opponent depends on one or two considerations. The witness must be one I think whom it was necessary to produce in person at the trial and whom it was not reasonable to expect the litigant to examine on commission. It was decided as long ago as *The Karla* (1), before Dr. Lushington, that a litigant cannot in all circumstances, and could not in those of that case, be obliged to examine a witness beforehand, and is in those circumstances entitled to call him personally at the trial. But when he seeks to charge his opponent with the expense of doing so I do not think that authority precludes the question of whether he acted reasonably in incurring the expense. The answer to that question must depend upon the importance of enabling the Court to hear the witness give evidence in person, the nature and importance of his evidence, and the expense incurred as compared with the importance of the case, which is not necessarily measured solely by the amount of money involved. In this case no such question was raised before the assistant-registrar or the President, or indeed by the appellant before us, though I think I suggested the possibility of it during the argument, and I think we must take it for the purposes of this appeal that it was reasonable for the plaintiffs to detain the witness for the trial. In that case, for the reasons I have given, I think the plaintiffs are entitled to charge the proper expense of such detention against the defendants, and the only question remaining is whether the assistant-registrar has allowed an unreasonable amount to the witness.

Speaking generally, this is a matter for the discretion of

(1) Br. & Lush. 367.

the registrar, and the Court will not interfere unless he has proceeded on a wrong principle. The assistant-registrar's answer in this case to the objections was as follows: "In my opinion the basis upon which a witness necessarily detained for a trial should be remunerated is the amount he would have earned during the period of detention if he had not been detained. There is nothing in the quotation from Mr. Roscoe's book to which reference is made in the objections to controvert this proposition. The evidence was perfectly clear in this case (1st) that the witness was necessarily prevented from taking part in the voyage in question (this is not now questioned), and (2nd) that in consequence of his detention the witness lost the amount which I have allowed. In my opinion the contention put forward in the objections that in cases of detention a witness is not to be remunerated on the basis of what he has lost, but upon some other fictitious basis, is unsound. Of course it may be necessary in some cases where the precise amount of the loss cannot be ascertained to make an allowance based upon average earnings, but where, as here, the actual loss can be accurately determined it should be allowed."

I cannot assent to this as accurate. I do not think the compensation can depend upon the actual result of an adventure undertaken during the time of the detention. To adopt such a rate would be to involve the litigants and the witness in the results of an adventure possibly speculative. In this particular case the trawler might have been lost on the voyage and no catch secured, and in that case the witness (apart from the question of insurance) could have earned nothing, and, if the assistant-registrar's principle be logically applied, would be entitled to no compensation because he had suffered no loss.

I do not think the actual loss in a particular period can be said to be necessarily the measure of compensation, and I think the only direction that can be given is that the assistant-registrar must award the reasonable compensation to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was

C. A. 1921

THE IBIS VI.

Lord Sterndale M.R.

earning about the time of detention not as an absolute measure, but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be ignored.

As I cannot consider the principle applied by the assistant-registrar to be correct I think the case must go back to him to award compensation to the witness and costs to the plaintiffs on the principles I have stated above.

The appellants argued before us that the witness should only be paid conduct money with a subpœna, or at the outside only such charges as are contained in the scales of charges as witnesses' allowances. This I think ignores the special conditions I have mentioned as to nautical witnesses such as give evidence in the Admiralty Division, and is incorrect. They also argued that at the outside he should only be allowed the wages paid to men of his class, and that the engineer of the trawler was the man nearest to his class and probably superior to him in education and skill. Therefore they contended that the witness should not be paid more than the wages paid to the engineer according to the articles.

I think there is no foundation for this argument. I do not feel myself capable of comparing the education, skill, and attainments of the engineer of a trawler with those of a mate, and I am not satisfied that it is conclusively established that the amount of payment is always in strict proportion to the merits of the payee. But I think the short answer is that a mate is not an engineer and an engineer is not a mate, nor are a mate and an engineer in the same class of employees. Without considering which is the superior it is enough to say that they are different. Their duties are different; they are paid not only different amounts, but by a different method, and in inquiring into compensation to a mate it is a mate's wages and not an engineer's which are a guide. The authorities on the subject are discussed in the judgment to be delivered by Younger L.J., and I do not propose to repeat the discussion.

The appellant must have the costs of the appeal and of the hearing before the President, the costs of the past and

future hearings before the assistant-registrar should be dealt with by him.

Warrington L.J. requests me to say that he agrees with this judgment.

YOUNGER L.J. I entirely concur in the order just intimated by my Lord, and I would for myself add nothing to the judgment he has delivered were it not that I find in the grounds given by the learned assistant-registrar for allowing this large sum of 280*l.* 11*s.* 3*d.* as the expenses of a single seafaring witness in this comparatively trifling case grave reason for the apprehension that allowances of an amount equal to and in many cases indefinitely exceeding that impugned on this appeal may in the Admiralty Division come to be made on a party and party taxation, almost as a matter of course, unless some attempt be made here and now to recapture and restate from the authorities upon the subject some of the principles with reference to which the wide discretion of the registrars in these matters ought to be exercised.

It would in my judgment be a grave misfortune if an excessive liberality in the matter of such allowances were to become normal in any Division of the High Court. The true attitude with regard to them is, I think, that described by Bovill C.J. in *Potter* v. *Rankin* (1) with reference to just such an allowance as that now in question. It may be salutary to recall it: "It is the duty," the Chief Justice says, "of the master to watch most jealously and exercise the most scrupulous care in dealing with such a claim." In the same connection I would recall the observations taken from the judgment in *Smith* v. *Buller* (2) as enunciating a sound principle specially valuable in these times of pervading financial stress: "It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. . . . . I adhere to the rule which has already been laid down that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more.

(1) 1870 L. R. 5 C. P. 518, 521. (2) (1875) L. R. 19 Eq. 473, 475.

C. A. 1921

THE IBIS VI.

Younger L.J.

Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them."

These warnings are as applicable to proceedings in the Admiralty Division as in any other Division of the High Court. True it is that special considerations are, and so far as I can find always have been, applicable to the remuneration of seafaring witnesses detained to give evidence in Courts of Justice; and it is of course a trite observation that the testimony of such witnesses constitutes the bulk of that adduced in Admiralty, so that the question of the proper allowances to be chargeable on taxation in respect of their attendance arises far more frequently there than in any other Division.

But what is a proper allowance for such a witness must depend upon similar considerations whatever be the Court in which he testifies, and it will not, in this connection, be forgotten that the only existing rule upon the matter is expressly made applicable to every branch of the Supreme Court: Order LXV., r. 27, provides as follows: "The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature. (9) As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." That is the rule which governs the present question, and the relevant circumstances which raise it may now be shortly stated.

The dispute in the action arose out of a collision in 1917 between two steam trawlers—the *Port Jackson* and the *Ibis VI.*—the owners of the *Port Jackson* being plaintiffs. The damage sustained by their vessel was, after the liability of the defendants, the owners of the *Ibis VI.*, for the collision had been established at the trial, agreed without further inquiry at 300*l.* From the plaintiffs' bill of costs which I have perused, there appears to have been no complication of any kind in the suit: the circumstances were entirely ordinary, and for an Admiralty action the sum throughout

involved was relatively trifling. The action was commenced in June, 1917, and seems to have proceeded in a leisurely fashion. By an order of April 23, 1918, November 27 following was fixed for the trial of the cause as being a day convenient for the plaintiffs and their witnesses. The trial took place on that day as contemplated and arranged, and was then concluded. The plaintiffs called or were prepared to call at the hearing four witnesses, in addition to the witness Burton, the mate in charge of the *Port Jackson*, whose expenses are now in question. These witnesses, as also Burton, had on October 12 been duly subpœnaed to attend the Court at the trial. Their expenses are all included in the plaintiffs' bill of costs and allowed. They are moderate, and no question arises with regard to them. At the trial the plaintiffs succeeded and were awarded damages and the costs of the suit. Their damages, as I have said, were later agreed at 300*l.*

The plaintiffs' total bill of costs as taxed amounts to 552*l.* 5*s.* 11*d.* In that bill are included two items claimed and allowed by the assistant-registrar of 280*l.* 11*s.* 5*d.* in respect of Arthur Burton, the mate: "Loss of time and earnings while detained on shore for the purpose of giving evidence from November 8 to December 3, 1918," and also 4*l.* 19*s.* 4*d.* in respect of that same witness's rail and hotel expenses. The first of these items is that which is now in question. The amount charged in respect of the attendance at the one day's trial of a single witness in such a suit as this, and that witness a mate in a steam trawler, is sufficiently startling. It represents almost as much as the whole amount involved in the action, and more than half of the plaintiffs' entire costs of suit from beginning to end, extending as it did from Trinity, 1917, to Hilary, 1920. It is arrived at as being the entire sum which the witness, as a person entitled to a share of the catch, would have earned had he not been prevented by his detention for the trial from sailing as mate on the Belgian trawler *J. Baels Maurieux* on a fishing trip to Iceland which commenced on November 9, 1918, and ended in fact on December 3, 1918. The assistant-registrar

C. A. 1921

THE IBIS VI.

Younger L.J.

has allowed that claim in full, and he has given the following reasons for allowing it. [His Lordship read the reasons set out above and continued:] The ominous features of that finding consist to my mind in this, that the assistant-registrar expresses it in general terms, as embodying a principle applicable to every class of seafaring witness irrespective of his status or condition; nor is there any reference, at least in terms, to the vital distinction between the remuneration which a litigant may, if he chooses, agree to pay a witness whom he calls and the sum with which in respect of that witness's attendance he may properly charge his opponent. The learned President did not feel himself at liberty to interfere with that finding, but, to my mind, rightly or wrongly, if such be its purport and effect, it has, as I think, no true warrant either in principle or authority; while if unchallenged or accepted, it would, in my judgment, carry with it the seeds of much future mischief.

I agree, however, with my Lord, that so far as the actual determination of this appeal is concerned, there are at least two very relevant considerations normally applicable to such a case which although not in terms referred to by the learned assistant-registrar were, we must assume, duly weighed by him and resolved in a sense favourable to the plaintiffs. Accordingly, if I refer to them now, before discussing the questions which are open to us, it is not because they affect our present decision, but because I desire to emphasize their importance in all such cases when they arise, and I do not desire it to be supposed that they have here been overlooked.

The first is that although this sum of 280*l.* 11*s.* 5*d.* would presumably have been receivable by Burton had he sailed on the *J. Baels Maurieux* at some date shortly after the conclusion of the fishing voyage on December 3, 1918, no payment was made to him by the plaintiffs in respect of it until nearly nineteen months later and on the eve of taxation. Now the rule in this matter as between a witness and a party calling him is well settled. The reasonable expenses of a witness, whether intended to be charged against the other side or not, ought to be tendered to him when he is served

C. A. 1921

THE IBIS VI.

Younger L.J.

with the subpœna, and if he is to be remunerated for loss of time such remuneration ought also then to be tendered to him. The witness's remuneration in the present case, having regard to the basis on which it is arrived at, could not of course have been tendered with his subpœna. But if it was to be paid at all, it should in the ordinary course have been paid at the earliest moment after its amount had been ascertained. It was not so paid. Now arrangements in connection with such a payment as this similar to that so severely animadverted upon in *Hale* v. *Bates* (1) are, I suspect, not yet uncommon. A payment on the eve of taxation is made on an understanding that so much of it as is disallowed shall be returned. Of course, I do not in the least suggest that anything of the kind happened here. On the contrary, I assume that the learned assistant-registrar satisfied himself that it did not. I allude to the matter, as I have said, by reason of its extreme importance in all such cases. A suitor claiming to charge such a disbursement against his defeated opponent should be required to establish as an indispensable preliminary that he has irrevocably himself made the payment or that he is liable to make it. This, in my judgment, to use Bovill C.J.'s words, is one matter which every taxing officer should watch most narrowly.

The second matter to which I desire to refer is this. No application was in the present case made by the plaintiffs to have this potentially most expensive witness examined on commission before the trial. To my mind this is a consideration which should always be most carefully weighed by a taxing master before he allows a charge for that witness's attendance so disproportionate as the present charge is, whatever be the angle from which it is regarded.

I am disposed to think that in the Admiralty Court the importance of this aspect of the question at issue has become somewhat obscured by reason of the statement attributed to Dr. Lushington by the headnote in *The Karla* (2), and from there transferred to the books of practice: see Roscoe, 4th ed., p. 424. The statement is "that a party is not bound

(1) (1858) E. B. & E. 575. (2) Br. & Lush. 367.

C. A. 1921

THE IBIS VI.

Younger L.J.

to examine a witness before the trial." But if that case be examined it will be found that Dr. Lushington's actual statement on this subject is much more guarded than that so attributed to him. Dealing with the facts of that case, what he said was this: "I cannot conceive that it is ever incumbent upon the owner of a vessel, who is *defendant* in the cause, to proceed to the examination of *foreign* witnesses by affidavit, or by commission or oral examination, *before the petition is examined upon, or, in other words, before the witnesses for the plaintiff have been examined*"—I desire to emphasize those words—"he is not bound to pursue such a course."

These words are, it will be noted, carefully guarded and fall far short of the statement compendiously imputed to Dr. Lushington, and that in two respects not here applicable which are of real importance in matters relating to the attendance and examination of witnesses. The first is that the witnesses there were the defendant's witnesses, the other that they were foreigners, whose further attendance the Court might be quite powerless to enforce.

But the importance of this matter in the general aspect of it is dealt with in other cases. I will mention only two. In *Temperley* v. *Scott* (1), where a claim was made by the plaintiff in respect of the detention, as a witness, of a master of a ship at the rate of 10*l.* a month on the ground that he had by reason of his detention lost profitable employment, the taxing master allowed 8*l.* It was proved that the plaintiff had offered beforehand to have the master examined on interrogatories: the defendant had refused. The defendant appealed from the allowance of 8*l.*, and argued the general principle to which I shall later refer, that he could not be charged with any sum in respect of the witness's loss of time. But Tindal C.J. said: "It is unnecessary in this case to agitate the general principle as to the allowance of costs for loss of time; for, in the first place, the sum which has been allowed in this case for subsistence is not extravagant; very little, if at all, more than was necessary for the board and lodging of a witness in Grewcock's station; and then

(1) (1832) 8 Bing. 392, 393.

C. A. 1921

THE IBIS VI.

Younger L.J.

an offer was made to the adverse party to examine the witness on interrogatories, and warning was given of the expense that would attend his refusal. Perhaps he made a prudent election; but it reduces the case to a bargain between the two parties, which precludes the necessity of any interference on the part of the Court." The second case is *Evans* v. *Watson*. (1) There a claim of 10*s*. a day in respect of loss of time of a captain witness for 300 days was made. 7*s*. for 300 days was allowed. In that case Tindal C.J. said: "This action is brought to recover a large sum of money; and, after having obtained an order for the postponement of the trial on the ground of the absence of material witnesses, the defendants have thought fit to pay the sum demanded, and now complain that the plaintiff has done all that he reasonably could and ought to have done to insure success. The postponement of the trial was a favour to the defendants: it was for them to ascertain, when they asked it, whether the price at which they purchased that favour was not too great. If the witness has been wantonly and unnecessarily kept here by the plaintiff, the case would have been very different. But I am of opinion he was, under the circumstances, very properly detained for examination viva voce, in consequence of the intimation from the defendants that they meant to impugn his conduct." And Maule J. said: "I also think the allowance of subsistence money to the witness in this case was properly made. It cannot be laid down as a general rule, that, in all cases where a witness might be examined on interrogatories, the party for whom he is to be called, may at his option detain him for examination viva voce. But still he must be allowed a reasonable exercise of discretion: and, where the matter is doubtful, I think the party detaining him should have the benefit of the doubt."

And to my mind it stands to reason that in many cases this consideration should be decisive against the right of a party to make upon his opponent on taxation such a claim as the present. Unless the presence of the witness at the trial is of really serious importance to the plaintiff's case,

(1) (1846) 3 C. B. 327, 329, 330.

C. A. 1921

THE IBIS VI.

Younger L.J.

such entirely disproportionate expense as is here involved in detaining him and not examining him on commission is surely a luxury for which prima facie the plaintiff should himself pay, unless on application made to the defendant the latter has objected to the witness being so examined. If due regard be in proper cases paid to this consideration, such difficulties as emerge in the present will, I am satisfied, rarely arise. Here, however, I again assume that this matter has been sufficiently considered by the learned assistant-registrar; although on the assumption which I fully make that this claim is a genuine claim I must say that I can myself see no ground, nor was any suggested, beyond the statement imputed to Dr. Lushington, why this witness Burton should not have been examined at any time during what we were told was his long stay ashore prior to November 8, 1918.

I come now to the real ground upon which the issue of the appeal must turn. Has the learned assistant-registrar proceeded when he allowed this claim on a wrong principle? As I have said, I think he has. The question at issue has a long history. We may take as a convenient starting point the principle enunciated in *Collins* v. *Godefroy* (1)—a principle still the law of the Court, although its application has been softened by later rules of procedure, namely, that there being a duty imposed by law upon a person regularly subpœnaed to attend from time to time and give his evidence, a promise to give him remuneration for loss of time incurred in such attendance is a promise without consideration, and the fact that allowances are given as between party and party in respect of the attendance of professional witnesses does not alter the law in this matter.

Remuneration for loss of time of professional witnesses was apparently, as is recognized in *Collins* v. *Godefroy* (1), always an exception to the general rule laid down in that case. It would also appear that seafaring witnesses at all times held a similar position of advantage, privileged in this respect in all Courts, for reasons which may conveniently be taken from the judgment in *Berry* v. *Pratt* (2): "Upon

(1) (1831) 1 B. & Ad. 950. (2) (1823) 1 B. & C. 276.

C. A. 1921

THE IBIS VI.

Younger L.J.

principle, the master was justified in allowing the subsistence-money in question. Although the witness was an Englishman, yet he was a seafaring man; and, unless detained for the purpose of giving evidence, might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial, on account of his absence. There would also have been some danger of his evidence being altogether lost by the various casualties to which seafaring-men are exposed."

Moreover it is, I think, true to say that as regards a seaman, as was stated by Dr. Lushington in *The Olive* (1), the rate of wages is a fair criterion on which the allowance to him may be based—presumably because the normal wages of an ordinary seaman are no more than a decent living wage. But there is no warrant in any of the authorities I have been able to find for the proposition that this statement is true of captains or other lower grade officers, any more than for the proposition that, in the case of professional witnesses, it is ever applicable so as to justify an allowance to one in excess of that made to another because his business was more prosperous or because his absence from business involved him in greater loss. On the contrary it will be found in *Stewart* v. *Steele* (2)—to take one instance of a captain of a ship—that remuneration of 400*l.* in respect of a detention of 370 days was only allowed in respect of his attendance as a witness, although the evidence was that the earnings of which he had been deprived by his detention were 1000*l.* a year exclusive of board and lodging. Again in *Evans* v. *Watson* (3), already cited—another captain's case, where a claim of 150*l.* in respect of 300 days' detention was made but only 97*l.* 14*s.* 2*d.*—7*s.* a day—for the same 300 days was allowed.

For the principle adopted by the learned assistant-registrar—ignored, if it existed, in these cases—I can find no warrant anywhere, and on a consideration of its general character it stands, in my judgment, self-condemned. Take

(1) Swa. 292.
(2) (1842) 4 Man. & G. 669.
(3) 3 C. B. 327.

C. A. 1921

THE IBIS VI.

Younger L.J.

the present case. There its application would, according to the event, have instructed an allowance of thousands of pounds, or one reduced to nothing at all. If the fishing trip, which, as it was, extended for five days after the trial, had been prolonged for five weeks, the defendants would, I presume, have been necessarily chargeable on this principle with the further profits earned by Burton's substitute during that extended period had no other employment been found by Burton in the interval. In other cases the application of the principle might necessitate an examination of books and accounts yielding results purely arbitrary in relation to a witness's importance as such. And these consequences are not imaginary, because the truth is that the supposed principle is untenable, in that it ignores entirely the initial obligation of every citizen and every sojourner within reach of the Court's process to give evidence in the courts of this country when duly summoned for the purpose: it ignores the fact that the provisions of the Rules of Court under which compensation may be charged against the opponents of those who require his attendance are on the basis of a strictly reasonable allowance, made on the footing that the witness's obligation to testify, while it remains an obligation, is not to become either a sacrifice on the one hand or a profit on the other. It would in my judgment be pessimi exempli if this principle enunciated by the learned assistant-registrar, now that it has been challenged, were held by this Court to be tenable. If it were so held, the result would be that to the uncertainty of litigation in its issue would inevitably be added increased uncertainty as to its cost, necessarily involving such a risk to many a plaintiff with a good cause of action and to many a defendant with a good defence as would deter them from further prosecution or resistance, and so in effect bring about a denial of justice in their cases.

In my judgment the initial obligation on the part of a witness duly summoned to attend, and, in the interests of justice, to give evidence, should never be forgotten in fixing on a party and party taxation any payment in excess of his actual expenses chargeable in respect of his attendance

C. A. 1921

THE IBIS VI.

Younger L.J.

against the defeated party. It is no part of the duty of the Court to minimize or ignore that obligation: rather is it the privilege of the Court to proclaim it and insist upon its observance. If in matters of taxation it be forgotten, the results must in all cases, not absolutely normal, be arbitrary, in most, excessive, in some, extravagant. And while remuneration for his loss of time may, in respect of a seafaring witness, be now, as always, properly allowed by the registrar on taxation, and while in the case of an ordinary seaman his wages may still supply a fair criterion on which the allowance may be based, that criterion has not, as has been seen, any necessary application to other ratings, nor can it be applied, as it seems to me, so as to be extended either for better or for worse to the purely speculative share of profits of a fishing voyage from the prosecution of which the witness was, by his attendance at the trial, detained, but the necessary risks or hardships of which he was not called upon to undergo.

It is not within my capacity, nor if I possessed the wit would it appear to me to be right, to suggest any formula for the governance of a taxing officer in such a case as this. His discretion is and ought to be wide: any attempt to fetter it in advance would be mischievous.

But this much, I feel, that I may say after an examination of the cases and bearing in mind the proper attitude of the registrar towards all such claims. Little objection, in the bulk of such cases, could, I think, be raised to an allowance for the detention of a necessary seafaring witness if that allowance be based upon a reasonable subsistence payment suitable to a person in his station in life while not exceeding any loss actually incurred by him by reason of his detention or any real remuneration which, but for that detention, the witness would have earned or of which by reason thereof he may have been deprived.

If the witness is to receive more, he may be left to get it from the party who detained him; even that party is on the principle of *Collins* v. *Godefroy* (1) liable for no more. If he

(1) 1 B. & Ad. 950.

C. A. 1921

THE IBIS VI.

Younger L.J.

thinks fit to pay more he does so as a luxury of litigation in which it has pleased him to indulge.

For these reasons I concur in the view that this appeal should be allowed, and this item in the plaintiffs' bill of costs be referred back to the learned assistant-registrar for reconsideration.

Appeal allowed.

Solicitors for the plaintiffs: *Nicholson, Graham & Jones, for J. R. Gaulter, Fleetwood.*

Solicitors for the defendants: *Downing, Handcock, Middleton & Lewis.*

E. C. M. T.

C. A. 1921 *March* 8.

[IN THE COURT OF APPEAL.]

THE CITY OF EDINBURGH.

Admiralty—Dockowners—Limitation of Liability—Damage Outside Dock Area—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 *Vict. c.* 32), *s.* 2.

By s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . . performs any duty or exercises any power."

By the negligence of the plaintiffs' servants while engaged on work on the steamship *City of Edinburgh* in the Hornby Dock, belonging to the Mersey Docks and Harbour Board, the vessel and her cargo were damaged by fire, and the plaintiffs were held liable in damages. The plaintiffs sought to limit their liability under the above section on the ground that they were the owners of a dry dock at Garston:—

Held, that the liability being in no way connected with the fact that the plaintiffs were dockowners, they were not entitled to a decree of limitation of liability.

Decision of Hill J. ante, p. 70, affirmed.

C. A. 1921

THE CITY OF EDINBURGH.

APPEAL from a decision of Hill J. (1) refusing a decree of limitation of liability.

The plaintiffs were H. and C. Grayson, Ld., ship repairers and the owners of Graysons' Dry Dock, Garston. The defendants were "the owners of the steamship *City of Edinburgh* and of her cargo, and all other persons claiming to have sustained damage by reason of a fire which occurred on the said vessel on or about the 27th day of June, 1918."

It appeared that while the *City of Edinburgh* was lying in the Hornby Dock, Liverpool, a dock belonging to the Mersey Docks and Harbour Board, a fire was occasioned through the negligence of one of the plaintiffs' servants while the plaintiffs were engaged in executing repairs and fitting the vessel with mine defence equipment.

On July 16, 1918, an action was instituted in the King's Bench Division by the Ellerman Lines, Ld., the owners of the *City of Edinburgh*, against the present plaintiffs, and it was finally held by the House of Lords, upholding the decision of the Court of Appeal, that the plaintiffs were liable for the loss occasioned by the fire. (2) A number of actions by the owners of cargo on board the *City of Edinburgh* were also instituted and in respect of these actions the plaintiffs admitted liability.

In these circumstances the plaintiffs in the present action claimed a declaration that as dockowners they were entitled under s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, to a decree limiting their liability to an amount not exceeding 8*l.* for each ton of the largest registered British ship which at the time of the damage occurring was, or within the period of five years previous thereto had been, within the area over which the plaintiffs performed any duty or exercised any power. The largest registered British ship which came within the terms of the section was the *Bellagio*, whose registered tonnage calculated in accordance with the Merchant Shipping Acts, 1894 to 1906, was 3785.21 tons. The plaintiffs accordingly claimed

(1) Ante, p. 70. (2) [1920] A. C. 466.

C. A. 1921

THE CITY OF EDINBURGH.

a declaration that the amount for which they were liable was 30,281*l.* 13*s.* 8*d.*, and no more.

The defendants contended that as the liability was incurred by the plaintiffs in their capacity of ship repairers and not within the dock or area over which they exercised any power, the plaintiffs were not entitled to the decree claimed. Hill J. upheld this contention and gave judgment for the defendants. The plaintiffs appealed.

Butler Aspinall K.C., *Greaves-Lord K.C.* and *Noad* for the appellants.

A. T. Miller K.C. and *James Dickinson* for the respondents.

[The arguments for the appellants were the same as in the Court below. The respondents were not called on.]

LORD STERNDALE M.R. I think this appeal must be dismissed.

It is an appeal from Hill J. in an action brought by the plaintiffs to limit their liability in respect of injury done to the *City of Edinburgh* upon which they were doing repairs. The ship was being repaired in the Hornby Dock, one of the most northerly docks in Liverpool. The plaintiffs, a well-known firm of ship repairers in Liverpool, had a dry dock at Garston, not in the control of the Mersey Docks and Harbour Board, but situated a long way up the river about ten miles from the place where the work was being done. According to Mr. Aspinall's argument it does not matter, however, if it is 10 miles or 10,000 miles; the work may be in the course of being done anywhere, and yet the plaintiffs are entitled to the protection of the statute.

Now what happened was this: a boy in the employ of the plaintiffs managed to drop a red-hot rivet into one of the holds of the *City of Edinburgh*, causing a very disastrous fire. Litigation ensued which went to the House of Lords and the present plaintiffs were held responsible for the damages. They now come to this Court and ask for a limitation of their liability under s. 2 of the Merchant Shipping Act, 1900, which provides that: "The owners of any dock or canal, or a

harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power." Sub-s. 4 of the same section defines the term "dock." It is to "include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing-places, and jetties."

The contention is that s. 2 enables the dockowner to limit his liability for any damage done to a vessel however caused and wherever caused, because he happens to be the owner of a dock, and, as Hill J. points out, inasmuch as a dock is defined as including a slip or jetty, it would be a very easy method of insurance to become possessed of a very small slip or jetty to which only a very small vessel could come. No liability could then accrue for any injury done by the slip or jetty owners to a vessel or goods on board a vessel beyond 8*l.* on a tonnage of perhaps five or ten tons according to the size of the small vessel which could get or had got to their jetty. I have not used the word "absurd" up to now, but I am prepared to use it, and to say that such a result would be absurd. I agree that if Parliament has chosen directly in so many words to produce an absurd result then that absurd result must be produced, but the Court is entitled and indeed bound to look at an Act of Parliament from this point of view, that if there is a reasonable and sensible construction of it and also an absurd one, the Court should lean to the sensible construction.

Under these circumstances I should have said without the assistance I am going to refer to in a moment, that the section

C. A. 1921

THE CITY OF EDINBURGH.

Lord Sterndale M.R.

must refer to a limitation of liability, as one of my learned brothers has suggested, of the dockowner as such—i.e., in respect of something in some way connected with his dock. I do not attempt to define everything to which it does apply, I have only to decide for the moment to what it does not apply. I should have said that it must be limited in the way suggested, and Mr. Aspinall has helped me to that conclusion by referring to the previous legislation, and by suggesting that the intention was to put the dockowner in the same position, or at any rate in as responsible a position as the shipowner who limits his liability under the Merchant Shipping Act. Now the shipowner only gets a decree of limitation of liability in respect of some injury or damage caused by other persons in some way relating to his ship; the damage must be to somebody or something in the ship or damage caused by the ship. I do not know that it is necessary to put it as narrowly as that with regard to the dockowner, but when a shipowner gets a decree of limitation it is in respect of something connected with his ship, and I think a dockowner should only get a decree in respect of damage in some way connected with his dock. The losses in this case were in no way connected with the plaintiffs' dock. The decision of Hill J. that the plaintiffs were not entitled to the decree of limitation claimed in this action was quite right, and the appeal must be dismissed with costs.

SCRUTTON L.J. But for hearing the argument addressed to us in this case I should have thought that the case was unarguable; having heard it I remain of the opinion that it was unarguable. It is one of those cases where Parliament has used very wide words which interpreted in their widest sense lead to absurdity, and interpreted in their limited sense are reasonable. In this case it appears to me to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity. In this case the repairs in the Hornby Dock had nothing to do with the ownership of a dock at Garston, and for that reason the Garston dockowners

cannot limit their liability for what their boy did in the Hornby Dock ten miles off.

C. A. 1921

THE CITY OF EDINBURGH.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for the respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

E. C. M. T.

ADMIRALTY.

1921
Mar. 3, 4, 23.

THE COUNTESS.

Admiralty—Collision with Dock Gates—Dockowners' Rights of Detention—Statutory Powers of the Mersey Docks and Harbour Board—Limitation of Liability—Priorities—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504, 530—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act*, 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Board Act*, 1912 (2 & 3 *Geo.* 5, *c. xii.*), *s.* 7.

The plaintiffs' steamship *C.*, which was lying in a dock belonging to the defendants, the Mersey Docks and Harbour Board, negligently went ahead instead of astern and crashed through the dock gates into the river, carrying with her a number of craft, some of which were sunk. The *C.* herself received considerable damage and had to be beached by tugs on the Tranmere beach. At a point of time when in fact the *C.* had already been beached the defendants' assistant-marine surveyor certified that she was "in a sinking condition" in the river and in his judgment "an obstruction impediment or danger," or likely so to become, to the safe and convenient navigation of the port. The defendants then took charge of the *C.*, and patched, docked and repaired her at a cost of 1048*l.* The damage done to the defendants' docks and works due to the negligence of the plaintiffs' servants amounted to 10,014*l.*

The plaintiffs instituted proceedings for limitation of liability. The defendants claimed the right to detain the *C.* by virtue of their statutory powers under the Mersey Dock Acts Consolidation Act, 1858, and the Mersey Docks and Harbour Act, 1912, until the plaintiffs had paid the sum of 4468*l.* 4*s.* 9*d.*, the statutory amount of their liability calculated in accordance with the Merchant Shipping Acts, and in addition the sum of 1048*l.* Thereupon the plaintiffs issued a writ in detinue, alleging

1921

THE COUNTESS.

that the detention of the *C.* was wrongful. The defendants set up their alleged statutory powers by way of counterclaim.

By s. 94 of the Mersey Dock Acts Consolidation Act, 1858, a vessel negligently doing damage to any works belonging to the Dock Board may be detained until the amount of the damage, or a deposit for the estimated amount, has been paid. By s. 1 of the Merchant Shipping Act, 1900, a shipowner's right of limitation of liability under the Merchant Shipping Act, 1894, is extended to all cases where without his actual fault or privity any loss or damage is caused to property of any kind, whether on land or water, by reason of the improper navigation of the ship; and by s. 3 the limitation under the Act applies "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act."

By s. 7 of the Mersey Docks and Harbour Act, 1912, the Dock Board may remove the wreck of any vessel or any vessel sunk or stranded within the port which in the judgment (written and duly recorded) of the marine surveyor or his assistant is an obstruction, impediment, or danger to the safe use of the port or likely in his judgment so to become, and the Board may sell the wreck or vessel and out of the proceeds retain the expenses to which they have been put. Similar rights are given to harbour and conservancy authorities by s. 530 of the Merchant Shipping Act, 1894:—

Held, (*a*) that until a limitation decree was made the detention of the *C.* under s. 94 of the Act of 1858 was rightly made in exercise of the defendants' statutory rights; but (*b*) that after a decree of limitation, s. 94 did not give the defendants priority over other claimants to the limitation fund, that the fund must be distributed rateably, and that the liability of the plaintiffs to the defendants upon which the lien of the defendants depended was reduced in proportion as the total claims exceeded the plaintiffs' limited statutory liability. (*c*) That although the *C.* was not a "wreck," she was a vessel "stranded" and "likely to become an obstruction impediment or danger to navigation"; that the judgment of the assistant marine surveyor was sufficiently certified to comply with the provisions of s. 7 of the Act of 1912, and that accordingly the defendants were entitled to recover the sum of 1048*l.*

ACTION of limitation of liability and action of detinue tried together.

The plaintiffs in both actions were the owners of the steamship *Countess*. The defendants in the limitation action were the Mersey Docks and Harbour Board and all others claiming to have sustained damage by reason of a collision between the *Countess* and the dock gates at the Alfred Dock, Birkenhead, on June 5, 1920. The defendants in the detinue action were the Mersey Docks and Harbour Board.

The facts and the sections of the statutes relied on are summarized in the headnote and are fully set out in the

judgment, but it is thought that a short statement of the issues may be useful in following the arguments.

The accident happened about 11.10 A.M. on June 5, 1920. The *Countess* was at once taken in tow by tugs, and at 3.30 P.M. when the assistant marine surveyor signed his certificate stating that the vessel was in a sinking condition off the Alfred Docks, and in his judgment an obstruction, impediment, or danger to the safe navigation of the port or likely to become so, she had been securely beached. By letter of the same date the defendants gave notice to the plaintiffs that pursuant to s. 7 of the Mersey Docks and Harbour Board Act, 1912, they would proceed to raise, destroy, or remove the vessel as might be necessary. By letter of June 7, 1920, notice was given to the plaintiffs that damage had been done by the *Countess* to works belonging to the defendants for which the plaintiffs would be held liable, that the defendants were dealing with her under their statutory powers, and that she was also detained in respect of the damage under s. 94 of the Mersey Dock Acts Consolidation Act, 1858. On or about June 9, 1920, the defendants, after patching the vessel, effecting the necessary temporary repairs and pumping her out, raised and removed her to one of their docks in Liverpool pursuant, it was alleged, to the provisions of s. 7 of the Act of 1912, and ss. 530 to 534 inclusive of the Merchant Shipping Act, 1894. The expenses of raising and removing the ship and of detainer amounted to the sum of 1048*l.* 6*s.* 11*d.* or thereabouts. The damage done to the defendants' dock and works amounted to approximately 10,000*l.*

On June 14, 1920, the plaintiffs issued their writ in the limitation action in which they claimed a decree limiting their liability to 4468*l.* 4*s.* 9*d.*, being 8*l.* per ton on 558·53 tons, the registered tonnage of the *Countess* calculated in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1906. No defence was delivered to this action. On July 12, 1920, the plaintiffs issued their writ in the detinue action in which they claimed the release of the vessel and damages for her detention. In this action on an appeal from the judge in chambers the Court of Appeal on July 26,

1921

THE COUNTESS.

1920, ordered the *Countess* to be released on the plaintiffs paying into Court the sum of 5500*l.* On November 30, 1920, the defendants delivered a defence setting up their statutory powers and a counterclaim asking for a declaration that they were entitled to detain the vessel until the sum of 4468*l.* 4*s.* 9*d.* was paid, or, if no decree of limitation of liability was made, until the actual amount of the damage done to the defendants' property was paid; in addition they claimed the sum of 1048*l.* 6*s.* 11*d.*

R. A. Wright K.C., *A. T. Miller K.C.*, and *Noad* for the plaintiffs. Sect. 94 of the Mersey Dock Acts Consolidation Act must be read together with the limitation sections of the Merchant Shipping Acts. The right of detention under s. 94 cannot affect the plaintiffs' right to limit their liability under s. 1 of the Merchant Shipping Act, 1900: see s. 3 of the latter Act, which provides in terms that the limitation shall apply notwithstanding anything contained in the Act under which the liability arises. The defendants can only exercise a lien up to the amount of the plaintiffs' statutory liability, and subject to the priorities of other claims upon the limitation fund. As regards the claim under s. 7 of the Mersey Docks and Harbour Act, 1912, or s. 530 of the Merchant Shipping Act, 1894, the *Countess* was not sunk or stranded, nor was she a wreck. The certificate of the assistant marine surveyor did not contain the finding of fact necessary to support the claim; s. 7 must be strictly complied with. The vessel was not "off the Alfred Docks," nor "in a sinking condition"; she was safely beached on Tranmere beach and was not "likely to become an obstruction to navigation." The certificate, therefore, is bad on its face. The value of the *Countess* is 34,000*l.*, and the detinue action has only been brought in order to obtain an interim order for release on bail which the Court of Appeal has already granted. No appearance has been entered by the defendants in the limitation proceedings, and there can be no defence to that action.

W. Greaves-Lord K.C. and *E. Stewart-Brown* for the defendants. After a decree of limitation of liability has been made

1921

THE COUNTESS.

it is admitted that the defendants' rights of lien are limited to the plaintiffs' statutory amount of liability, 4468*l.* 4*s.* 9*d.*, but the defendants are entitled to the whole of that sum; they have prior rights under s. 94 of their Act of 1858 which are not taken away by the limitation sections in the Merchant Shipping Acts and they cannot be compelled to share rateably with other claimants to the limitation fund. Before the Merchant Shipping Act of 1912 the other claimants, the owners of craft sunk and damaged through the collision, would have had no claim upon the fund; the plaintiffs could not have limited their liability against such claimants, and the Act does not cut down the rights of dock-owners and at the same time give others, who had no rights at all, a remedy as well.

[SIR HENRY DUKE. Must not s. 504 of the Merchant Shipping Act, 1894, be read with s. 3 of the Act of 1912 ?]

No; for in that case there would be no need for the proviso that the limitation shall apply notwithstanding anything contained in the Act under which the liability arises; s. 3 has no reference to the distribution of the amount. Distribution is not always made upon a rateable basis: *Rankine* v. *Raschen*. (1) As regards the validity of the certificate of the assistant marine surveyor, the conditions precedent are that he should exercise his judgment on the question whether the vessel was an obstruction or likely to be an obstruction, and that the judgment should be certified and recorded. Under the Act of 1912 there must be either a wreck or a vessel sunk or stranded. The *Countess* was a "wreck," for she was in such a condition that she was not seaworthy or fit to proceed on a mercantile adventure: *The Olympic*. (2) Alternatively, she was a vessel "stranded," she was put ashore to avoid the possibility of sinking: *De Mattos* v. *Saunders*. (3) If the vessel is a wreck or stranded, the surveyor must then form an honest judgment as to whether she is an obstruction or likely to become an obstruction. The *Countess* in her position on the beach was likely to become an obstruction. It is not

(1) (1877) 4 R. 725.
(2) [1913] P. 92.
(3) (1872) L. R. 7 C. P. 570.

1921

THE COUNTESS.

necessary for the judgment to be recorded before taking action : *Jones* v. *Mersey Docks and Harbour Board* (1), and it is immaterial, therefore, that at the time the certificate was written the exact position of the *Countess* in the river had altered.

Balloch for various owners of craft. My clients have entered appearances in the limitation proceedings. It is immaterial to them that the *Countess* has been released on bail in the detinue action, provided that the plaintiffs pay into Court 8*l.* per ton on the registered tonnage of the *Countess* in the limitation action. The Dock Board have only a right to detain the vessel for such an amount as they can legally recover, i.e., at most 8*l.* per ton. They can detain until that amount is paid, but they cannot assert any privileged right to the limitation fund ; all the claimants share rateably : cf. *The Crathie.* (2)

A. T. Miller K.C. in reply. *The Olympic* (3) was a decision on special words in s. 158 of the Merchant Shipping Act and does not support the contention that the *Countess* was a "wreck." She was not dealt with as a vessel "stranded," and the question whether she was likely to become an obstruction was not considered.

Cur. adv. vult.

1921. March 23. The following judgment was read by

THE PRESIDENT (SIR HENRY DUKE). These are two actions brought by the plaintiffs, William Hay and others, owners of the steamship *Countess*, against the Mersey Docks and Harbour Board. The first in date was an action in common form for limitation of liability in respect of a collision of the plaintiffs' steamship with the dock gates of the Alfred Dock at Birkenhead, a dock of the defendants. By reason of the existence of demands of the defendants which did not arise out of the collision and other circumstances which made it doubtful whether the questions at issue between the parties could be disposed of in an action for limitation of liability, the plaintiffs issued their writ in an action founded upon an alleged wrongful

(1) (1913) 18 Com. Cas. 163. (2) [1897] P. 178.
(3) [1913] P. 92.

detention, and in this action the defendants set up by way of defence and counterclaim the several claims in respect of which they allege themselves to have been entitled at all material times to hold possession of the plaintiffs' steamship. These are claims of the defendants under their statutory powers.

The plaintiffs' vessel was on the morning of June 5, 1920, in the eastern float of the Alfred Dock waiting to proceed into the Mersey, when an order was given by her master to go full speed astern, but her engines were put full speed ahead and the ship crashed through the dock gates, with the result that a great body of water escaped from the float and carried into the river not only the plaintiffs' vessel but a large number of barges and floats, some of which were sunk. The plaintiffs' steamship was holed in the engine-room and suffered other damage. The liability thrown upon the plaintiffs by reason of the damage to the dock, and to the large number of vessels damaged and sunk, is the liability sought to be limited by the plaintiffs' original action.

The accident took place at about 11.10 A.M. The *Countess* was found very shortly afterwards to be in danger of sinking in the river. Her engine-room was flooded and she was down by the stern, so that, as was stated by her master, the deck at the counter was nearly in the water. The master hailed a privately owned tug, the *Egerton*, and requested her master to put the *Countess* somewhere on the beach. The *Egerton* towed the *Countess* to Tranmere beach and put her aground there. While the *Countess* was lying in the river the occurrence at the dock was reported to the defendants' senior assistant marine surveyor, Lieut.-Commander Shankland, and upon being informed of the position and condition of the *Countess* he gave directions to the master of the *Salvor*, a tug of the defendants, that the *Countess* should be put high on the beach at Tranmere and secured there, with precautions such as are usually taken by the defendants in such cases. The *Salvor* proceeded to carry out these instructions and followed the *Countess* and the *Egerton* to the beach, but did not interfere with the operations of the *Egerton*. The *Egerton* was unable by reason of her draught to place the *Countess* high on the

1921

THE COUNTESS.

The President.

beach. The *Countess* took the ground at about 15 to 18 feet from her head, but was not aground for her full length aft. The beach falls away rapidly beyond the slope on which the *Countess* was and her stern overhung deep water. The master of the *Salvor* saw the position of the *Countess*, and in order to ensure her safety he made fast his vessel across the stern of the *Countess*, went on board of her with several of his men, and directed the putting out of moorings and an anchor ahead. The *Salvor* left after two or three hours, but at high water sent another tug, the *Torfrida*, and this vessel placed the *Countess* in a secure position on the beach. The assistant marine surveyor, after he had given his directions to the *Salvor*, and indeed after they had been to some extent carried out, prepared a certificate with regard to the *Countess* in the exercise of his powers under the Mersey Docks and Harbour Act, 1912, s. 7. He signed it at about 3.30 P.M. and it was lodged at the defendants' office at about 4.40 P.M. The certificate is as follows: "Mersey Docks & Harbour Board. To the General Manager & Secretary. Sir, Pursuant to s. 7 of the Mersey Docks and Harbour Act, 1912, I hereby certify that the S.S. *Countess* is in a sinking condition in the river off the Alfred Docks river entrance within the Port of Liverpool and that such vessel is in my judgment an obstruction or impediment or danger or is likely in my judgment to become an obstruction impediment or danger to the safe and convenient navigation or use of that part of the said port. I am, Sir, etc."

On June 5 the defendants wrote to the plaintiffs informing them of the accident at the Alfred Dock and that they were dealing with the *Countess* under powers given them by their before-mentioned Act of 1912, and on June 7 wrote them again claiming to detain the vessel under their statutory powers in respect of the damage to their works. On the same day the marine commander of the defendants ratified what had been done by the defendants' officers, and a representative of the plaintiffs who had informed the plaintiffs on June 5 that the *Countess* was in the hands of the Dock Board wrote them thus: "The Dock & Harbour Board have charge of

1921

THE COUNTESS.

The President.

this vessel and they will not hand her back to owners until she is in a safe condition and not a danger to navigation. In other words they are now proceeding to put a patch over the large hole, and to put a portable salvage pump on board, and when she is patched they will pump her out and deliver her to a dry dock." On June 9 the vessel was removed by the defendants to the Herculaneum Dock for permanent repair, under an arrangement between the plaintiffs and the defendants that the Dock Board's claim under their statutory powers should not be prejudiced.

The cost to the Dock and Harbour Board of the work done in and about securing and repairing the *Countess* was agreed at the hearing at 1048*l.* 6*s.* 11*d.*

While the permanent repairs to the *Countess* were being carried out, questions arose between the plaintiffs and the defendants as to the claim of the defendants to detain the *Countess* in respect of the damage due to the collision and the expenses included in the sum of 1048*l.* 6*s.* 11*d.* On June 14 the plaintiffs issued their writ claiming a decree of limitation of liability, and they delivered a statement of claim in that action on July 5. This they followed up on July 13 by a writ alleging that the detention of the *Countess* was wrongful. In their second action they made an interlocutory application to the Court for the release of the vessel, and on July 26 an order was made in the Court of Appeal in the terms following: "The defendants claiming to detain the ship until 4468*l.* 4*s.* 9*d.*, the estimated amount of the vessel's statutory liability, and 1000*l.*, the estimated amount of the Conservancy expenses, is paid, and the plaintiffs disputing the defendants' rights to detain the vessel for these sums. . . . . It is ordered that on the plaintiffs paying into Court to the credit of this action the sum of 5500*l.* the vessel be released by the defendants and if it is decided that the defendants' claim of lien is justified the defendants' rights over the sum in Court to be the same as they would have had if the sum in question had been paid to them as deposits under s. 94 of the Mersey Dock Acts Consolidation Act, 1858, and s. 7 of the Mersey Docks and Harbour Board Act, 1912. The plaintiffs, by their counsel,

1921

THE COUNTESS.

The President.

undertaking that in the event of the amount fixed by the decree in the limitation of liability action exceeding the said sum of 4468*l.* 4*s.* 9*d.*, or in the event of the decree being refused, that they will forthwith pay into Court to the credit of this action such additional sum as shall, together with the said sum of 4468*l.* 4*s.* 9*d.*, amount to the sum so decreed, or, if there is no decree, to the estimated amount of the defendants' damage claim. And further undertaking that in the event of the defendants' claim for Conservancy expenses exceeding the sum of 1000*l.* they will pay into Court, to the credit of this action, the amount of such excess or such amount as the Court shall hold to be reasonable."

At the hearing before me there was no question on the defendants' part that the plaintiffs are entitled to the usual declarations in their action for limitation of liability, and it was agreed that the statutory amount of the plaintiffs' liability is 4468*l.* 4*s.* 9½*d.* in respect of the collision. Plaintiffs' counsel mentioned that the actual value of the *Countess* was estimated at 34,000*l.*, and it had been agreed in the course of the litigation that the damage done to the defendants' works on June 5 would cost to repair 10,014*l.* The defendants justified the detention of the *Countess* under s. 94 of their Act of 1858, and s. 7 of their Act of 1912, and alleged a justification alternatively under the Merchant Shipping Act, 1894, s. 530. They also claimed payment of such sums as may be found payable under the Order of July 26, 1920.

The Mersey Dock Acts Consolidation Act, 1858, s. 94, so far as it is material, provides that "In every case in which any damage shall be done to any . . . . work belonging to the Board, through the misconduct, negligence, or default of the master of any vessel, or any other person on board of any vessel, the amount of such damage may be recovered from such master or the owner of such vessel before any justice in a summary way . . . . ; or, at the option of the Board, such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the Board for the estimated amount of

damage so done by such vessel," and after the amount of the expenses has been ascertained the Board may "apply such deposit or a sufficient part thereof in making good such damage, and shall return the residue of such deposit, if any, to the said master or owner." The Mersey Docks and Harbour Act, 1912, s. 7, so far as is material, provides that "The Board may raise destroy or remove the wreck of any vessel or any vessel . . . . sunk or stranded . . . . within the port of Liverpool . . . . and which shall be in the judgment of the marine surveyor . . . . or in case of his absence or disability then of the assistant marine surveyor . . . . such judgment being recorded in writing signed by him and deposited with the Secretary of the Board an obstruction or impediment or danger or is likely in such judgment as aforesaid to become an obstruction impediment or danger to the safe and convenient navigation or use thereof and may . . . . sell in such manner as they may think proper the said vessel or wreck . . . . and out of the proceeds . . . . retain the expenses together with the expenses of detainer and sale. . . . ."

The rights claimed by the defendants under the Merchant Shipping Act, 1894, arise, if at all, under s. 530, which provides that "where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or Conservancy authority . . . . in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation . . . . in that harbour or water . . . . that authority may (*a*) take possession of, and raise, remove, or destroy the whole or any part of the vessel; and (*b*) light or buoy any such vessel or part until the raising, removal, or destruction thereof; and (*c*) sell . . . . and out of the proceeds of the sale reimburse themselves. . . . ."

Mr. Wright on behalf of the plaintiffs argued that the detention of the *Countess* for the two sums named in the counterclaim was wrongful as being made and maintained for an amount in excess of anything due to the defendants and without statutory warrant. As to the 1858 Act he submitted that the detention was unwarranted in point of time and mode and amount. As to the 1912 Act he objected further

1921

THE COUNTESS.

The President.

that the vessel was not in fact a wreck, or sunk or stranded, and that the certificate made by the assistant marine surveyor when the *Countess* was on the beach was avoided by proof of the actual situation of the vessel when the certificate was made, and since it did not certify the vessel to be stranded was ineffectual to authorize detention of the *Countess* as a stranded ship. With regard to the alternative claim under the Merchant Shipping Act, 1894, s. 530, counsel for plaintiffs took a further point that the defendant Board was not shown to have been of opinion that the *Countess* as she lay at Tranmere beach was or was likely to become an obstruction or danger to the navigation of the Mersey, and that until such an opinion is in fact formed by the authority under the statute, the power to take possession, remove, hold as security, or sell, does not arise.

Mr. Greaves-Lord asserted, on behalf of the Dock and Harbour Board, a right in the events that happened to detain under the Act of 1858, for the amount of the damage caused by the collision, at all events until (if at all) the liability of the plaintiffs should be limited; and a further right under the Act of 1912, acting on the judgment of the surveyor, to remove the *Countess* from her original position at Tranmere beach to her ultimate position there, and from the beach to the Herculaneum Dock, and to hold and sell the vessel in order to pay the expenses thereby incurred. The certificate of the surveyor, given on the afternoon of June 5, he defended as a sufficient evidence of the judgment formed and acted on in the morning. Any expenses other than that of removal which were included in the sum of 1048*l.* he claimed for the defendants as salvors.

The main question involved in the case is that of the effect upon the defendants' powers under the Act of 1858 of the statutory provisions for limitation of liability which are embodied in the Merchant Shipping Act, 1894, ss. 503 and 504, and in the Merchant Shipping Act, 1900, ss. 1, 2 and 3, with regard more particularly to the enactment in the last mentioned statute whereby liability for damage such as is in question here is brought within the liabilities capable of

1921

THE COUNTESS.

The President.

limitation, and dock and harbour owners and authorities are enabled to limit their liability for damage caused to shipping by negligence of their servants.

The question raised under the defendants' Act of 1912 is of less general importance than that under their Act of 1858, but is no doubt of considerable consequence to the defendants by reason of the necessity of immediate action in a waterway like the Mersey when the security or convenience of navigation is threatened by a sudden occurrence like that of June 5, 1920.

The argument with regard to the defendants' Act of 1858 was addressed to three topics: first, whether the defendants' right of detention is taken away by the Merchant Shipping Acts; secondly, whether the lien upon the vessel which is created by s. 94 survives notwithstanding the right of the plaintiffs to obtain a declaration of limitation of liability; and, thirdly, whether if it survives, it is a lien for the whole amount of the damage to the defendants' works, or only for the sum which may become payable to the defendants rateably with other losers by the collision, when the amount payable by the plaintiffs comes to be distributed.

Sect. 503 of the Merchant Shipping Act, 1894, so far as it is material enacts that, "The owners of a ship shall not . . . . where . . . . without their actual fault or privity any loss or damage is caused to any other vessel . . . . by reason of the improper navigation of the ship, be liable to damages . . . . in respect of loss of, or damage to, vessels, goods, merchandise or other things beyond an aggregate amount not exceeding 8*l.* for each ton of their ship's tonnage." Sect. 504 provides that where any liability is alleged to have been incurred by the owner of a ship in respect of damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply to the High Court, and that Court may determine the amount of the owner's liability and distribute that amount rateably among the several claimants, and may stay any proceedings in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any

1921

THE COUNTESS.

The President.

claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just.

By the Merchant Shipping Act, 1900, s. 1, the right of limitation of liability on the part of shipowners under the Merchant Shipping Act, 1894, is extended to "all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship." This includes the damage done by the *Countess* at the Alfred Dock. By s. 2 of the same Act, "The owners of any dock . . . . or a harbour authority . . . . shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, be liable to damages beyond an aggregate amount" determined with regard to the shipping user of their undertaking. By s. 3 the limitation of liability under the Act is made to apply "whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act," and s. 5 provides that the Act shall be read and construed as one with the Act of 1894.

The extent to which the defendants' powers under s. 94 of the Act of 1858 are modified by the Merchant Shipping Acts was much debated. Mr. Wright did not contend that they were wholly revoked. Mr. Greaves-Lord developed an argument which amounted in substance to a claim that the defendants have by virtue of this section a priority over other claimants in respect of damage caused by the collision. He presented the defendants in the light of secured creditors in a class by themselves, entitled to rank before the general body of the persons who suffered loss by the occurrence, and insisted that no express words to deprive them of the advantages of s. 94 could be found in the general Acts, that the policy of the legislation until 1900 had been illustrated by the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, and by many local Acts, and that a construction adverse to their right would be contrary to the presumable intention of the Legislature. I do not find in the Act of 1900 language which

1921

THE COUNTESS.

The President.

supports this view. While the Legislature extended the shipowners' privilege of limited liability by including in it liability for damage to docks it also extended to the owners of docks a like privilege of limitation for damage to shipping. Further, in s. 3 of the Act express notice is taken of the enactments, public and general, local and private, which relate to liabilities in respect of damage to dock undertakings.

The true means of ascertaining whether and to what extent the provisions of the defendants' private Act of 1858 are modified by the general Acts is to read the respective enactments together, and see how far, upon a reasonable construction of the language employed, the two sets of enactments can stand together. At the outset it is to be observed that, if no action to limit liability is instituted, the provisions of s. 94 can operate absolutely. So also if the action is unsuccessful. Sect. 94 is therefore not repealed by implication. How far it is modified can perhaps be seen by applying the terms of the later legislation by way of proviso. Down to the time of decree in a limitation action the two sets of powers and rights can well co-exist. After decree the powers and rights conferred by the earlier legislation are diminished. The liability of the plaintiffs to the defendants upon which the defendants' lien over the plaintiffs' vessel depends is reduced in proportion as the total claims from all quarters exceed the limited statutory liability.

The first question of real difficulty arises when you come to consider whether by necessary implication the legislation has transferred the defendants' lien from the ship, or the deposit made in lieu of the ship, to the statutory fund which is to be provided by the owners and distributed rateably by the Court. I do not find it more remarkable that the Legislature should modify the statutory security of the defendants in respect of damage to their docks than that it should have modified the rights in rem of the shipowners who had a maritime lien for damage done to their vessels. To hold the defendants to be entitled to recover their damages independently of the sum to be paid upon limitation of liability would be to disregard the express language of the Merchant Shipping

1921

THE COUNTESS.

The President.

Act, 1894, s. 503: "the owners shall not be liable . . . . beyond an aggregate amount not exceeding £*x* per ton." To hold the defendants entitled to a priority in the distribution of the limited amount would be to disobey the statutory direction that that amount shall be distributed rateably. I was referred to the decision in *Rankine* v. *Raschen* (1) as authority for a proposition that the distribution is not inevitably made upon a rateable basis. The case does not appear to me to conflict with the view I take. On the contrary, where a shipowner had paid one claimant in full, the Court of Session held that prejudice resulted to him only and that the rights of other claimants for their rateable amounts were not affected. When limitation of liability is applied for, as in this case, before any payment on account of liability has been made, it seems to me impossible that the Court should prefer any one of the claimants. I hold that the defendants have not the suggested priority, and that the plaintiffs' right to a limitation of liability covers their liability to the defendants in respect of the defendants' claim for the damages, amounting to 10,014*l.*, done to their dock in the collision.

It is true that the Legislature has not by the Merchant Shipping Act, 1900, directed, with regard to the detention by the Dock Authority of a ship which has done damage to their works, what shall happen if and when the liability of the owner in respect of the negligence causing the damage comes to be limited. Sect. 504 of the Act of 1894 deals with the whole matter of procedure in very general terms. While there is nothing express or implied in the statute to take away the defendants' right to detain pending the decree for limitation of the plaintiffs' liability, the provisions in the defendants' Act of 1858 for detention of the ship until the entire amount of the damage to their works shall have been ascertained and paid are inconsistent with those parts of the limitation sections of the Merchant Shipping Acts which contemplate release of the ship against provision of or security for the limited amount, and to the extent to which they are inconsistent they are

(1) 4 R. 725.

impliedly repealed. The substance of the matter is that the defendants' power of detention in the period between the decree for limitation of liability and satisfaction of their claim is left by the Legislature, together with many other incidents of limitation of liability, to be dealt with according to law. I see nothing surprising in this. Long before 1900 the rights of the holder of a possessory lien upon a ship had been reconciled by the Court with the right of a plaintiff having a cause of action in rem and power to obtain arrest of the ship by virtue of that right. And in the present case any difficulty which existed was solved by the order of the Court of Appeal for the release of the *Countess* against a payment into Court and upon terms.

The submission which was made on behalf of the plaintiffs that the defendants did not in this case duly exercise their right of detention under their Act of 1858 requires a brief examination of what was in fact done. The direction as to the *Countess* originally given on the defendants' behalf was that given on June 5 under the powers of the Act of 1912 with regard to removal of vessels wrecked or stranded, or likely to cause obstruction to navigation. The detention under the Act of 1858 was made in express terms on June 7 while the *Countess* was on Tranmere beach under the control of the defendants' officials. This is said on the part of the plaintiffs to have been a detention otherwise than in the mode and form required by a strict construction of the Act of 1858. Such powers are to be exercised in strict conformity with the law, but I see no reasonable ground for saying that there was not such an exercise in this case. The vessel still lay on the beach where she was placed after the collision, within the defendants' jurisdiction, and without, so far as appears, any intervention of rights of third parties which affected the matter. I hold therefore that the detention was duly made in the exercise of the defendants' statutory right.

As to the beaching and removal of the *Countess* and her temporary repair, the powers of the defendants' Act of 1912 are relied upon by them, and they also claim as salvors. What is challenged is the detention of the vessel for the expenses,

1921

THE COUNTESS.

The President.

amounting to 1048*l.*, which the defendants incurred. Mr. Wright did not challenge the details of the outlay, or its propriety, but contended that in order to make the sum a charge upon the ship the requirements of s. 7 of the Act must be strictly complied with. I think they must, and it is said for the defendants that they were. What has to be determined is whether the *Countess* was a wreck or a vessel stranded within the Port of Liverpool which, in the judgment of the assistant marine surveyor duly recorded in writing signed by him and deposited with the Secretary of the Board, was or was likely to become an obstruction to the safe and convenient use of the Port. The chief objection taken on behalf of the plaintiffs was that when the assistant surveyor certified the *Countess* to be in a sinking condition, and to be or to be likely to become an obstruction, she was neither a wreck nor a stranded ship, but was safely moored on Tranmere beach. It was argued on behalf of the defendants that the *Countess* was, if not a wreck, a vessel stranded, and that the judgment of the assistant surveyor was sufficiently certified. On the question of fact, my finding is that the *Countess* was not a wreck. The judgment of the Court of Appeal in *The Olympic* (1), under the Merchant Shipping Act, 1894, does not appear to me to be in point. The question there related to termination of wages contracts, and the meaning of the word " wreck " in s. 158 of the Merchant Shipping Act, 1894. Here the question is one of fact under the defendants' Act of 1912, where " wreck " and " vessel " are distinguished one from another. *De Mattos* v. *Saunders* (2) was cited as an authority on the question whether the *Countess* was stranded, and is one of a numerous class of cases decided upon contested claims against underwriters where the Courts were required to decide whether a ship conveying goods the subject of insurance had been stranded within the meaning of a policy. The decisive consideration in such cases is said to be whether the vessel takes the ground in the ordinary and usual course of navigation and management, or whether the ground is taken under extraordinary circumstances of time and place

(1) [1913] P. 92. (2) L. R. 7 C. P. 570.

1921

THE COUNTESS.

The President.

by reason of some unusual or accidental occurrence. Such authorities are no doubt helpful, but I do not think they are decisive in the present case. The question of fact is to be determined with regard to the language and objects of the Act of 1912. The *Countess* was a vessel narrowly saved from sinking and put upon the beach to save her from sinking. She was not under control of her own power, could not be floated with safety to herself or other vessels, and needed to be repaired before she could prudently be put afloat at all. *De Mattos* v. *Saunders* (1) shows that it is immaterial whether the vessel drifted to the beach or was guided there. I find her as she lay on the beach to have been, within the meaning of the Act of 1912, a vessel stranded. I may add that in my opinion the question whether this vessel was a wreck or was stranded is a question for the judge; but lest any element of fact should be involved I consulted the Elder Brethren who have been sitting with me, and they inform me that, looking at the facts and without regard to the requirements of any Act of Parliament, this vessel was not in their judgment a wreck, and, on the other hand, was a vessel stranded.

As to the form and effect of the surveyor's certificate, s. 7 of the Act does not require that the surveyor shall certify the particular condition of the vessel, which is a condition precedent to the power of removal. He is to form and to certify his judgment as to obstruction or risk of obstruction. The certificate in question was alleged to be void by reason of error as to subject matter and time. To what I have said as to the state of the *Countess* I have only to add that the words in the document which are descriptive of her condition are not necessary to the validity of the certificate, and that in my judgment the fact that they had become erroneous when the certificate was made and delivered is immaterial. With regard to time, it was not denied that the *Countess* was, when the surveyor formed his judgment on the morning of June 5, and was likely to be, an obstruction, impediment, and danger to navigation. The objection which was taken was that she no longer remained so when she had been removed

(1) L. R. 7 C. P. 570.

1921

THE COUNTESS.

The President.

to the beach. The assistant surveyor did not take that view, and, if it is material, I find upon this question of fact that the *Countess* as she lay at Tranmere beach was, and was likely to be, an obstruction, impediment, and danger to navigation, and fit to be removed by the defendants. It is true that the certificate did not in its terms relate to this time. I therefore add that, in my opinion, when on June 5, 1920, the assistant surveyor had formed his judgment to the effect required by the statute, the defendants by their officers were entitled forthwith to act upon it in respect of the matter in question in the exercise of their powers under s. 7, and that the judgment was sufficiently recorded. It was promptly recorded in the course of the transaction. I cannot see how the Board could secure to shipping the advantages intended to be conferred by the section, where action must be prompt to be effective, if between decision and action you interpose delay for formal official procedure. See on this subject *Jones* v. *Mersey Docks & Harbour Board.* (1) From the conclusions I have stated it follows that I hold the removal of the *Countess* to have been a removal under s. 7 of the Act of 1912 and the subsequent detention in respect of the defendants' expenses under this head to have been a justifiable detention.

The result of the whole matter is that there will be judgment for the plaintiffs in the action for limitation of liability; judgment for the defendants on the plaintiffs' claim in detinue, and, on the counterclaim, for payment out of the sum in Court of 1048*l.* 6*s.* 11*d.*, and for the declaration prayed that the defendants were entitled to detain the vessel under the Acts of 1858 and 1912. The balance of the money in Court will be transferred to the credit of the action for limitation of liability, which will proceed in the usual way.

Solicitors for the plaintiffs: *Charles Lightbound & Co., Liverpool.*

Solicitor for the defendants: *W. C. Thorne, Liverpool.*

Solicitors for appearers in the limitation action: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

(1) 18 Com. Cas. 163.

E. C. M. T.

DIVORCE.

1921
Feb. 28;
March 21.

LEAVIS *v.* LEAVIS.

Divorce—Practice—Costs—Alimony—Non-compliance with Orders—Contempt—Further Proceedings by Party in Contempt—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

Non-compliance with orders of the Divorce Division for the payment of costs and alimony is still a contempt of Court, although since the Debtors Act, 1869, the orders cannot be enforced by attachment.

After such non-compliance it is a matter for the discretion of the Court whether the party in contempt should be permitted to take a further proceeding in the litigation; and it is material to the exercise of that discretion to consider whether the non-compliance is due to the fault or the misfortune of the party in contempt.

In this case a husband, respondent to a petition for restitution of conjugal rights, failed to comply with orders for costs and alimony, and whilst in default took out a summons, under Divorce Rule 176, to stay the suit. The Court, not being satisfied that the respondent was unable to comply with the orders, refused to permit him to proceed.

ADJOURNED SUMMONS.

A wife filed a petition for restitution of conjugal rights on August 24, 1920. The respondent appeared but filed no answer. Orders for payment of taxed costs and giving security and for alimony pending the suit were made against the respondent on October 22 and 29 respectively. On December 7 the petitioner gave notice of motion for December 13, to attach the respondent for non-compliance with the direction to give security contained in the order of October 22. On December 10 the respondent took out a summons, under Divorce Rule 176, to stay the suit on the ground that he was willing to return to cohabitation. On December 13 the motion for attachment came on, and Sir Henry Duke P. ordered the writ to issue at the expiration of fourteen days. The summons to stay, after several adjournments, came before the President on January 31, 1921, and was by him adjourned into Court.

The summons now came on before Hill J. for argument.

There was a conflict of affidavit evidence as to the means and financial position of the respondent which is not material to this report.

1921

LEAVIS v. LEAVIS.

T. T. Bucknill for the petitioner. There is a preliminary objection to the hearing of this summons. The orders for alimony and costs have not been complied with, and the husband is therefore in contempt and not entitled to be heard on the summons.

J. B. Melville for the respondent. Since the Debtors Act, 1869, the orders, being orders to pay money, cannot be enforced by attachment: *Bates* v. *Bates* (1); *Ivimey* v. *Ivimey*. (2) They can only be enforced in the manner prescribed by Divorce Rules 179, 203. Non-compliance therefore no longer constitutes a contempt of Court, and the respondent is entitled to be heard.

T. T. Bucknill in reply. The argument for the respondent rests upon the fallacy that there cannot be a contempt, because there is no longer power to visit that contempt with the penalty of attachment. The contempt still exists: see Halsbury's Laws of England, "Contempt," vol. vii., pp. 280, 297, notes.

It is sufficient to sustain the preliminary objection that the orders have not been complied with.

Cur. adv. vult.

March 21. HILL J. [after stating the facts]. Counsel for the petitioner took the preliminary objection that the respondent is in contempt, and that the Court ought not to entertain the respondent's summons to stay the proceedings because he has not complied with certain orders which had already been made against him, and which he has done nothing to comply with up to the time of his summons. It is true that he cannot be attached for that non-compliance by reason of the Debtors Act, 1869, s. 4, but before the passing of that Act he could have been attached: *Ivimey* v. *Ivimey*. (2) Nevertheless these are orders which the Court can enforce according to the rules. As to orders for costs, that is pointed out in *Ivimey* v. *Ivimey* (2); and in the case of alimony, in *Bailey* v. *Bailey*. (3) Under the Divorce Rules

(1) (1888) 14 P. D. 17. (2) [1908] 2 K. B. 260.
(3) (1884) 13 Q. B. D. 855.

the petitioner is entitled to levy execution for arrears both of costs and alimony. Though the contempt constituted by disobedience to these orders cannot be enforced by attachment, it is none the less a contempt, and does not cease to be a contempt because the statute has taken away attachment as a remedy. The enforcement of such orders is regarded by this Court as important to the administration of justice, because the wife should have the costs of litigation provided for and not be left destitute.

I have come to the conclusion that it is a matter of discretion for the Court to consider, upon all the circumstances of the case, whether the summons of the respondent should be heard and that it is matter material to the exercise of that discretion to consider whether those circumstances are due to the fault or to the misfortune of the respondent. In the present case I am quite unable to perceive any cause of the present position but the fault of the respondent. It may be true that he has debts, but his income is 58*l.* per month, and I think that it is an unfounded contention that he cannot comply with such orders as have been made in the present case. I am strongly influenced by this view of the position; and even if the respondent made an offer to return and I was satisfied as to its bona fides, I should, in considering on what terms I should make an order to stay, have regard to the analogy of *Cooper* v. *Cooper* (1), and only make an order on the payment of the wife's costs to the date of the return to cohabitation.

Alimony pendente lite seems to me within the same principle. If the Court can impose such a condition as payment of arrears upon dismissing a petition, it must, I think, be able to impose it also on making an order to stay; and if so equally upon a summons to stay like the present.

On the general grounds that I have referred to, I dismiss the summons.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitors for respondent: *Bulcraig & Davis.*

(1) (1864) 3 Sw. & Tr. 392.

J. R. B.

1921
April 20.

DIVORCE.

WALTER *v.* WALTER.

Restitution of conjugal Rights—Agreement to live apart—Effect of Agreement—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

Though an agreement between husband and wife to live apart is not in itself a bar to a petition for restitution of conjugal rights, the effect of the Matrimonial Causes Act, 1884, which enacts that a respondent who fails to comply with a decree for restitution shall be deemed guilty of desertion without reasonable cause, and that a suit for judicial separation may be at once instituted, is that the Court has power to refuse a decree for restitution where such an agreement exists, and neither party has taken steps to set it aside.

Decision of the Court of Appeal in *Russell* v. *Russell* [1895] P. 315 applied and followed.

This was a wife's petition for restitution of conjugal rights. The parties were married on December 19, 1910, and a daughter was born in 1911. At the end of 1918 the petitioner committed adultery, but the husband after her confession condoned this adultery, and resumed cohabitation. In August, 1919, the parties quarrelled, and the husband insisted on his wife's living apart, which she did until the filing of this petition on December 6, 1919. During that time the husband had paid his wife an allowance of 3*l.* a week for her maintenance, and had paid for the maintenance of their daughter by his wife's mother. A son, admitted to be the child of the husband, was born on February 13, 1920, and the husband paid all the expenses attending the birth.

The husband in answer to the petition alleged that he had just cause for refusing to live with his wife, and that there was a valid and subsisting agreement between him and the petitioner to live separate and apart from each other. No sufficient cause for his refusal was proved other than the adultery which he had condoned. But the judge held that there was a valid and subsisting agreement proved by the correspondence between the parties that they would live apart.

The only point argued was whether such an agreement afforded an answer to the wife's petition.

1921

WALTER v. WALTER.

Kenelm Preedy for the petitioner. The existence of an agreement to live separate is no answer to a wife's petition for restitution of conjugal rights: *Spering* v. *Spering* (1); *Anquez* v. *Anquez*. (2) In this case there was a mere agreement to live apart, not a covenant not to sue.

Bayford K.C. and *T. Bucknill* for the respondent. It is true that in the Ecclesiastical Courts a separation deed or an agreement to live apart was held not to be a bar to a wife's petition for restitution. But the Matrimonial Causes Act, 1884, by making disobedience to a decree for restitution equivalent to desertion without reasonable cause, and by permitting a suit for judicial separation to be brought immediately after such disobedience, so alters the effect of a decree for restitution that the Court will not grant such a decree where it would compel the Court to treat one of the spouses as guilty of deserting the other without reasonable cause, when he has only acted on an agreement between them: see the judgment of the Court of Appeal in *Russell* v. *Russell*. (3)

LORD BIRKENHEAD L.C. In this case I have already found as a fact that there was an agreement between the parties to separate. There is, however, raised on the part of the petitioner the objection that, there being no covenant on her part not to sue for restitution of conjugal rights, she is entitled to put an end to the agreement.

Several cases were cited and the Act of 1884 was referred to. The effect of that statute was considered by the Court of Appeal in *Russell* v. *Russell* (3), and the judgment of that Court upon what is the material question in this case was not appealed from or affected by the decision of the House of Lords (4) which reversed the Court of Appeal upon other parts of the case. That judgment of the Court of Appeal is, therefore, binding upon me sitting here as a judge of first instance. In his judgment Lopes L.J. says (5): "It seems to us that since 1884, and by necessary implication, the Court

(1) (1863) 3 Sw. & Tr. 211.
(2) (1866) L. R. 1 P. & M. 176.
(3) [1895] P. 315.
(4) [1897] A. C. 395.
(5) [1895] P. 334.

1921

WALTER v. WALTER.

Lord Birkenhead L.C.

must have power to refuse a decree for restitution wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case." That expression being binding on me, I must apply the law so laid down to the facts of the present case. Here there is an agreement to live apart. Neither party took any step to set that agreement aside. Accordingly to pronounce a decree for restitution of conjugal rights now would, in the words I have quoted, be compelling the Court to treat the husband as having deserted his wife without reasonable cause, contrary to the justice of the case.

It is obvious that the parties will never live together again, and a decree for restitution of conjugal rights would in my judgment produce mischiefs similar to those pointed out by Rigby L.J. in *Russell* v. *Russell.* (1) The petition must be dismissed. The wife will have her taxed costs, not exceeding the sum paid into Court.

Solicitors for petitioner: *Stoneham & Sons.*
Solicitors for respondent: *Lee, Davis & Lee.*

(1) [1895] P. 340.

J. R. B.

ADMIRALTY. 1921
April 28.

THE LAKE FARRAGUT.

Admiralty—Collision—Fog Signals—Craft moored at Barge Roads—Port of London River Bye-Laws, art. 28.

By art. 28 of the Port of London River Bye-Laws, a vessel in fog, "when in the fairway and not under way shall at intervals of not more than one minute ring the bell rapidly for about five seconds. . . . . Sailing vessels of less than twenty tons gross tonnage and lighters shall not be obliged to give the above-mentioned signal, but if they do not they shall make some other efficient sound signal at intervals of not more than one minute."

The plaintiffs' dumb barge *J.* was lying at one of the barge roads in Woolwich Reach on the south side of the river. She was the outside barge of three barges moored to a dummy or house barge which was permanently moored there. The weather was foggy. There was a light on the dummy barge on which there was a watchman. There was no light on the *J.*, and no fog signals were being sounded either on the *J.*, which had no one on board her, or on the dummy barge. The *J.* was run into and sunk by the defendant's steamship *L. F.*:—

Held, that although barges moored at barge roads to some extent obstruct the navigable channel they cannot be said to be lying "in the fairway," and they are not required under art. 28 to ring their bells or make some other efficient sound signal in foggy weather; and that the *L. F.* was alone to blame for being under way in the fog and navigating too close to the south shore.

ACTION of damage by collision.

The plaintiffs were W. R. Cunis, Ld., owners of the dumb barge *Joan* and the bailees of her cargo; the defendants were the United States Shipping Board, the owners of the steamship *Lake Farragut*. The collision took place shortly after midnight on October 21, 1919, off Shepherds Lower Roads, Charlton, on the south side of Woolwich Reach, River Thames. The weather was thick with fog. The *Joan*, a steel barge of 98 tons register, laden with a cargo of coal, was the most northerly barge moored in the first rank of the barges lying at the roads. The tide was the first quarter ebb and the barges had swung and were heading to the tide. A white all-round light was exhibited on the house barge to which the dumb barges were moored. In these circumstances the *Lake Farragut*, a steamship of

1921

THE LAKE FARRAGUT.

2606 tons gross register, bound from Millwall Dock to the Anglo-American oil jetties at Purfleet came into collision with the *Joan* and sank her. The defendants alleged that no riding light was seen on or in the neighbourhood of the *Joan* and that those in charge of her were negligent (inter alia) in improperly mooring her so as to allow her to be in the fairway and in not ringing her bell for fog.

D. Stephens K.C. and *A. E. Nelson* for the plaintiffs.

L. Batten K.C. and *Stenham* for the defendants.

[It was contended on behalf of the defendants that where several barges are lying abreast moored at barge roads they of necessity obstruct the navigable channel and are in fact "in the fairway," which merely denotes a clear passage way by water navigable by vessels of moderate draught, and that it was negligent to leave the *Joan* unlighted and unattended in that position: *The Blue Bell* (1); and that even if technically the *Joan* was not in the fairway she ought as a seamanlike precaution to have indicated her position by some signal: *The Clutha Boat* 147. (2) For the plaintiffs it was contended that barges moored at recognized barge roads cannot be said to be "in the fairway"; that it is not negligent to leave them unattended if there is no reasonable ground for anticipating danger: *The Western Belle* (3); and that there was no duty cast upon the *Joan* either under the Port of London River Bye-Laws or by the rules of good seamanship to sound fog signals.]

THE PRESIDENT (SIR HENRY DUKE). The plaintiffs in this action are the owners of a steel dumb barge, the *Joan*, which with a cargo of coal was lying moored on the night of October 21, 1919, at the Charlton barge roads in Woolwich Reach. The *Joan* was lying third out from a dummy barge which lies permanently at the barge roads there. The first, second, and third barges towards mid-channel were lying securely moored, the first to the dummy barge, and the others

(1) [1895] P. 242. (2) [1909] P. 36.
(3) (1906) 10 Asp. M. L. C. 279.

1921

THE LAKE FARRAGUT.

The President.

by head moorings and breast moorings outside the dummy barge. The defendants' vessel, the *Lake Farragut,* was outward bound, and the intention of those in charge of her was to come to an anchorage at Purfleet. They left Millwall not long before midnight, and proceeded down the river, and the collision occurred within an hour of their starting on their voyage. The *Joan* was struck on her starboard bow by the stem and starboard bow of the *Lake Farragut.* It was very nearly a direct blow, which penetrated inboard to a depth of four feet, a very considerable injury which had the effect of forthwith sinking the barge.

The collision took place in a fog, and it is said on the part of the *Lake Farragut* that her master had decided, with the waterman who was acting as a pilot, to shift the vessel from Millwall to Purfleet, and to bring her to an anchorage as soon as possible. They had come to that conclusion somewhere in the neighbourhood of the Charlton barge roads about the time when they were entering Woolwich Reach. But for reasons which they have mentioned—which are not altogether satisfactory—they had not carried that intention out, and so they were under way in the river in the fog at the time of the collision. The explanation of the collision which was given by the master, the officers, and the pilot of the *Lake Farragut* was that the *Joan* was one of several craft which were moored at the barge roads, but that the craft had swung off at high tide, and were swinging out towards the middle of the river, and that they extended out from the barge roads 150 or 200 feet across the fairway. That is quite unfounded. The situation was that the *Joan* was securely moored, that the craft were moored abreast, and were securely moored, and that at the time when the collision happened they had swung to the ebb, and were head on tide, and they were lying there in as secure a condition and as slightly obstructing the fairway as barges lying in that position could lie. It is conceded that these are roads at which frequently barges in considerable numbers lie abreast. I accept the account given by the assistant harbour master. He said that sometimes the barges were moored four abreast and

1921

THE LAKE FARRAGUT.

The President.

sometimes six or seven abreast. That is not only well known to those who navigate the river, but the pilot of the *Lake Farragut* said he had seen as many as a dozen. There was nothing exceptional in the use of the roads by the plaintiffs' barge, and they were well within the legitimate use of the barge roads—the use for which barge roads are provided in the Thames.

The account which is given by the *Lake Farragut* is that she was passing down 100 feet or more outside the various moorings as she came down the river. There is a remarkable piece of evidence by which that can be decided. It is quite clear from the evidence of her master and of the pilot, that before this collision she had been put under a hard-a-starboard helm when the presence of the *Joan* was observed—when her loom was seen; that she had answered to her helm, and had gone round under a starboard helm to an extent variously put at a point or a point and a half, or perhaps more. That is the fact. Whoever had directed the *Lake Farragut* down to the point at which she was starboarding her helm, will be found upon an examination of the chart to have been bringing her on a course in which she must get into trouble, finding a barge in the position in which I find this barge to have been. The account given of the position and the course of the *Lake Farragut* by the master and the pilot is unsatisfactory, and it is clear that due care was not being taken with regard to the distance at which she should have been navigated so as to keep her free of the risk of collision with vessels at the roads. The collision took place owing to the fog. The truth of the matter is shown by the evidence of two or three witnesses; and I refer particularly to the evidence of the second officer, who described exactly what he saw. About 100 feet off he caught sight through the fog of the barge in question, and he saw something more—he states that he saw to the southward of the barge a light 100 feet off, but it was too late to avoid it.

I have come to the conclusion that the *Lake Farragut* was being navigated in a fog when she ought not to have been under way; that she was being navigated in a perilous position

1921

THE LAKE FARRAGUT.

The President.

which she never would have reached if she had not been navigated in a fog; and that being under way and reaching a dangerous place into which those conditions brought her, she came into collision end on with the *Joan* and sank her. The light which the second officer saw was no doubt the light on board the house barge. The *Lake Farragut* under those conditions, as I am advised by the Elder Brethren, was obviously to blame.

The real defence in the case is raised upon the assumption that I should make such a finding. It is said first of all that there was no light, and that there ought to have been. Now, whether there be a rule or not under the Thames bye-laws, as a matter of reasonable care there ought to have been a light under these conditions. I find that there was a light, and that the light was in a position in which it gave all the information that the light could give, and that it was the state of fog and the failure of the defendants' witnesses to discover the exact conditions, which prevented the defendants taking advantage of the information which the light ought to have given them.

Another defence is raised under art. 28, sub-s. (*h*), of the Port of London River Bye-Laws. That bye-law provides that a vessel when in the fairway and not under way, shall at intervals of not more than one minute ring her bell for about five seconds; and there is a proviso that sailing vessels under a certain tonnage, and lighters, shall not be obliged to give those signals; but if they do not give them, they shall make some other efficient sound signals at intervals of not more than a minute. Mr. Batten has argued that the *Joan*, a small vessel, was in the fairway and not under way, and neither rang a bell at intervals of not more than a minute nor sounded some other efficient signal; and he contends that if she had made some sufficient noise—and he enumerated various humble but effective means by which noises could be made—those on board the *Lake Farragut* would have taken notice of it, and would have deviated from their dangerous course sooner, and so might have avoided the collision.

I must examine that proposition in its two elements: I

1921

THE LAKE FARRAGUT.

The President.

must consider first of all whether the *Joan* did offend against the bye-laws. That depends upon whether she was a vessel in the fairway. I have asked the Elder Brethren their opinion, and they very definitely take the view that a barge moored in barge roads in the customary manner cannot, in ordinary nautical parlance, be described as a vessel in the fairway. The view that the Elder Brethren take is that the description " in the fairway " applies to a totally different state of things to that in which this barge was found. Speaking with the diffidence with which I am bound to speak on matters which are practically within the province of the Elder Brethren, I say that I entirely agree with them, and forming the best view that I can as to the purposes and subjects to which the bye-laws relate, I cannot think that the draftsman of the bye-laws—or those who enacted them—when they spoke of vessels in the fairway were speaking of vessels in the barge roads. A vessel in the barge roads has the privilege of obstructing the navigable waterway—the navigable channel—and she may do it within the necessary limits attendant upon the proper use of the roads. If that be the true view, then there is an end of this contention.

But I also have to consider—and it is a question of some difficulty—whether the bye-laws—contrary to the views of those who have been acting upon them for years past—do require a barge in barge roads to make a noise in a fog. If the bye-laws do put that requirement upon barges in roads, can it be said that the *Lake Farragut* would have been saved from this collision by having that notice ? I have to bear in mind that the *Lake Farragut* saw the lights up and down river from various barge roads, and saw the light on the house barge alongside of which the *Joan* was moored. I am not satisfied that if a noise had been made on board the *Joan* the *Lake Farragut* would have escaped collision. I am not satisfied that there was any apprehension of the position of the barge soon enough to have done that. But I say no more than that. It is impossible to say whether the *Lake Farragut* would have avoided collision or not ; I only say that I am not satisfied that she would have done so. In my view the *Joan*

1921

THE LAKE FARRAGUT.

The President

was not moored in the fairway, and was not under the obligation of sounding a bell at intervals of not less than a minute, or of making some other sound signal, and taking this view, I do not think the liability which attaches to the *Lake Farragut* by reason of the failure of ordinary care on the part of those in charge of her is discharged by other defences which have been raised. Mr. Batten suggested that apart from the bye-laws where a watchman on board of a house barge, with dumb barges moored alongside, knows there is a fog on the river, he ought to be on the lookout to assist in the navigation of the river, to warn persons in charge of vessels who may lose their way—as I think the *Lake Farragut* did in this case—of perils they may incur. I do not think there is any such obligation put upon those who have vessels moored in barge roads. I think that the obligation is to comply with the regulations, and, with respect to the dangers which come to their knowledge, to behave prudently in face of those dangers. No danger from the *Lake Farragut* came to the knowledge of the watchman on board the barge at any time that is material to this case. He was not to suppose, because there were fog signals blowing on the river, that the *Lake Farragut* was navigating down on such a course off the south shore that if she continued on it she would come into danger. That was not one of his reasonable expectations. He was there as a watchman. I think he was there for the security of property, but at any rate he did not fail in any particular in the discharge of any duty which he owed to the *Lake Farragut.*

Under these circumstances there must be judgment for the plaintiffs and a reference to the Registrar and merchants to assess the damages.

Solicitors for the plaintiffs : *J. A. & H. E. Farnfield.*

Solicitors for the defendants : *Thomas Cooper & Co.*

E. C. M. T.

1921
May 9.

ADMIRALTY.

THE VIGILANT.

Admiralty—Limitation of Liability—"Improper navigation"—Breach of Contract of Towage—Improperly casting off Tow Rope—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503—*Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 & 64 *Vict. c.* 32), *s.* 1.

A steam tug under contract to tow a ship down the River Tyne improperly cast off the towing hawser in order to go to another vessel, and before a second tug had got the ship under proper control the ship came into collision with a pier and received damage. The first tug was held to blame, and her owners sought to limit their liability under s. 503 of the Merchant Shipping Act, 1894, and s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. Sect. 503 enables shipowners to limit their liability where without their actual fault or privity damage is caused to any other vessel "by reason of the improper navigation of the ship." Sect. 1 of the Act of 1900 extends the right to limitation of liability for damage to property of any kind caused by the "improper navigation or management of the ship."

The owners of the tow contended that the damage was caused by the tug's failure to tow, and not by improper navigation or management, and that the failure to tow amounted only to a breach of contract in respect of which the tug owners could not limit their liability:—

Held, that the improper casting off of the tow rope was an act of improper navigation within the meaning of s. 503 and that the tug owners were entitled to a decree of limitation.

Action of limitation of liability.

The plaintiffs, the owners of the steam tug *Vigilant*, sought to limit their liability in respect of the damage sustained by the defendant's steamship *Frey* which came into collision with the Island Pier of the Albert Edward Dock in the River Tyne on June 10, 1914, while the *Vigilant* was under contract to tow the *Frey* from Howden Dock to the Albert Edward Dock.

An action was instituted by the owners of the *Frey* against the owners of the *Vigilant* for the damage sustained, and on April 20, 1920, the learned President pronounced the *Vigilant* to blame on the ground that, at a time when the *Frey* was still under the influence of the tide, the *Vigilant* improperly cast off the tow rope and abandoned the towage to another tug, in consequence of which, before the second tug had got the *Frey* under control, the *Frey* came into collision with the pier.

The registered tonnage of the *Vigilant* ascertained in accordance with the provisions of the Merchant Shipping Acts was 95.11 tons, and the plaintiffs claimed a declaration that they were entitled to limit their liability to 760*l.* 17*s.* 7*d.* (8*l.* per ton on the registered tonnage) on the ground that the accident happened without their actual fault or privity and was solely caused by "the improper navigation" of the *Vigilant* by their servants. The defendants denied that the damage was caused by "the improper navigation or management" of the tug, and alleged that it was solely caused by the plaintiffs' breach of contract in failing to attend upon and tow the *Frey*, and that accordingly the plaintiffs were not entitled to the decree claimed.

Langton for the plaintiffs. The negligence of those in charge of the *Vigilant* amounted to improper navigation. "Improper" navigation is not restricted to "negligent" navigation. Sect. 503 of the Merchant Shipping Act, 1894, applies to all damage wrongfully done by one ship to another while being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible: see the decision of Brett M.R. in *The Warkworth* (1) on the corresponding section in the Merchant Shipping Act of 1862. Further, a breach of contract may, as in this case, amount to improper navigation and it is then within the statute: *Wahlberg* v. *Young* (2); see also *London and South Western Ry. Co.* v. *James*. (3) But even if not within s. 503, by s. 1 of the Merchant Shipping Act, 1900, a shipowner's right of limitation is extended to all cases where damage is caused to property of any kind by reason of the improper navigation "or management" of the ship. The negligence in this case, even if it did not constitute improper navigation, certainly amounted to an act of improper management. The intention of the Legislature has been to give the widest possible protection where the shipowner has himself not been privy to the cause of the accident.

(1) (1884) 9 P. D. 145. (2) (1876) 4 Asp. M. L. C. 27n.
(3) (1872) L. R. 8 Ch. 241.

1921

THE VIGILANT.

Dumas for the defendants. The extension of the right of limitation given by the words "improper . . . . management" in the Act of 1900 has no reference to the class of acts now under consideration. The Act of 1900 allows dock owners to limit their liability and corresponding rights are given to shipowners whose vessels do damage while in dock. The word "management" therefore obviously refers to the mishandling of the vessel while in dock. In the present case, however, the plaintiffs have not pleaded that the damage was caused by the improper management of the *Vigilant*, and the only question is whether it was caused by improper navigation. Casting off the tow rope and abandoning the towage are not acts of improper navigation. Navigation is confined to matters of lights, engines, sails, helm or anchors. The deliberate casting off a tow-rope is a mere breach of the contract of towage. In *Wahlberg* v. *Young* (1) Brett J. said that a mere breach of the towing contract would not bring the case within s. 54 of the Merchant Shipping Act of 1862, and instanced a refusal to tow. This is an analogous case —a non-feasance and not a misfeasance. In all the reported cases on limitation of liability the wrong-doing vessel has been engaged in some act of navigation. Limitation of liability interferes with the common law right of recovering damages from a wrongdoer and the limiting sections should be construed strictly.

Langton replied.

THE PRESIDENT (SIR HENRY DUKE). In this case the owners of the steam tug *Vigilant* claim a decree of limitation limiting their liability in respect of damage caused to the *Frey*, a vessel belonging to the defendants, by collision with the Albert Pier at the Albert Edward Dock in the Tyne. The cause of the damage which was suffered by the *Frey*, and as to which liability is sought to be limited, was the subject of an action which was tried before me in April of last year. The present plaintiffs were owners of a fleet of tugs, and they had entered into a contract of towage with the

(1) 4 Asp. M. L. C. 27n.

owners of the *Frey*, which involved taking her down the Tyne and towing her from Howden Dock to the Albert Edward Dock. In the course of the performance of that contract of towage, when the *Frey* was in immediate proximity to the Island Pier of the Albert Edward Dock, and was to some extent under way—in the sense that she was a moving vessel and was subject to the action of the flow of the river—the *Vigilant*, which was one of the two tugs in charge of her, transferred her tow rope to another steam tug, the *Titan*, in order to proceed to the performance of some other contract, a towage which the now plaintiffs had contracted to perform.

The plaintiffs, the defendants in that action, were held liable at the trial for the damage caused to the *Frey*. The question here is whether they can limit their liability under the statutes in that behalf. It is contended on the one hand that either under s. 503 of the Merchant Shipping Act, 1894, or under the combined effect of that statute and of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1, the plaintiffs are entitled to limit their liability on the ground that the damage was caused by the improper navigation or management of their ship, the *Vigilant*, and they, the owners, were not in actual fault or privy to the negligence or improper navigation of the ship. It is not disputed that for the improper navigation of a tug in the act of towage, tug owners—subject to the general statutory restrictions on the right to limit liability—may limit their liability. For example, if, instead of letting go the tow rope which held the *Frey* the master of the *Vigilant* had slackened his tow rope, or if he had wrongly and improperly gone astern upon his engines, or executed any other negligent manœuvre in the act of towing, the negligence of which he was then guilty would be negligence in respect of which the plaintiffs might have limited their liability. But it is said on the part of the defendants that the negligence of those on board of the *Vigilant* was not negligence in the act of towing; it was negligence—or rather breach of contract—in failing to tow. The default which is relied upon is the transfer of the tow rope from the *Vigilant* to the *Titan*. That being so, it is said that there was no longer negligent towage

1921

THE VIGILANT.

The President.

from the moment of that transfer ; there was a failure to tow—a mere breach of contract—and by virtue of the principle enunciated in *Wahlberg* v. *Young* (1), and especially the declaration of Lord Esher (then Brett J.) in that case, a mere breach of the towage contract would not bring the case within the relevant sections of the Merchant Shipping Acts. Here, it is said, there was a mere breach of a towing contract, and therefore it is not within the sections of the Merchant Shipping Acts now relevant to the question of liability. It is to be observed, however, that in the judgments in *Wahlberg* v. *Young* (1) it is stated quite explicitly that the right to limit liability may apply equally whether the damage done through improper navigation arises from a breach of contract or from a single tort. Lord Coleridge C.J. stated that proposition in plain words ; Brett J. appears not to have dissented from the proposition ; and I understand Archibald J. to have concurred in the view of the Lord Chief Justice. It seems to me that what I have to determine in this case is whether there was something more than the mere breach of a contract to tow. Failure to tow at all would have been a clear instance of such a breach. Failure to complete towage at the time when no act of towage was in process of being performed would have been, as it seems to me, another clear instance of mere breach of contract. When I say no actual towage was in process, I mean when the *Frey* and the *Vigilant* were relatively in such a position that each of them could take charge of her own safety irrespective of the position resulting from any previous towage.

It seems to me that this case does not fall within either of the two categories which I have just mentioned. The finding upon which my judgment at the hearing mainly proceeded was that the tow rope of the *Frey* was transferred from the *Vigilant* to the *Titan* at a time when the towage was proceeding —when the process of towage which had brought the *Frey* to the point at which she had arrived still had its effect upon her, and when she herself had not the control of her own safety. That being the case, it seems to me that the transfer

(1) 4 Asp. M. L. C. 27n.

1921

THE VIGILANT.

The President.

of the tow rope from the *Vigilant* to the *Titan* was negligent towage—an act of negligence in the process of towage—and so is not within the class of acts as to which Lord Esher, in *Wahlberg* v. *Young* (1), declared that those acts were not within the provisions of the corresponding sections of the Merchant Shipping Act of 1862, which relate to limitation of liability for improper navigation.

The view of the matter which I take is that, relatively to the *Frey*, the *Vigilant* was engaged in an act of navigation when she transferred the tow rope of the *Frey* to the *Titan*; that the performance of that act of navigation was improper; and that, for that reason, the conduct of the plaintiffs' towage services constituted improper navigation within the meaning of the Merchant Shipping Act, 1894. My impression as to the effect of the extended provisions of the Act of 1900—the words, namely, which extend the limit of liability to acts of management as well as to acts of navigation—is that these provisions probably do not include the class of case which is here in question unless the original words, "improper navigation," include them.

In my view, the words "improper navigation" included what was done in this case, and, for that reason, the plaintiffs are entitled to limit their liability.

Solicitors for the plaintiffs: *Pritchard & Sons, for Wilkinson & Marshall, Newcastle-upon-Tyne.*

Solicitors for the defendants: *Thomas Cooper & Co.*

(1) 4 Asp. M. L. C. 27n.

E. C. M. T.

C. A.
1921
May 5, 6.

ADMIRALTY.

[IN THE COURT OF APPEAL.]

THE GULF OF SUEZ.

Admiralty—Collision—Steamship coming out of Dock—Crossing Rule—Helm Action to counteract Tide—Whistle signals—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 28.

The plaintiff's steamship *G.*, coming out of the Alfred Dock, Birkenhead, and the defendants' steamship *G. S.*, coming up the River Mersey, sighted each other about half a mile apart, the *G. S.* having the *G.* on her own starboard bow. To counteract the effect of the tide on her starboard bow the *G.* ported her helm a little and sounded two separate signals of one short blast. She did not, however, port her helm sufficiently to alter her course to starboard but continued on straight across the river under a slight port (or port and steady) helm. The two vessels came into collision on the Liverpool side of the river :—

Held, that the question whether the crossing rule (art. 19) applies in the case of a vessel coming out of dock and a vessel coming up or down the river depends on the distance at which they sight each other; that in the present case the vessels were just sufficiently far apart for the crossing rule to apply and that the *G. S.* was to blame for not stopping or reversing her engines.

In the Admiralty Court the *G.* was also held to blame for sounding port helm signals when she was not in fact "directing her course to starboard" (art. 28):—

Held (per Lord Sterndale M.R.) that the port helm signals were misleading in the sense that they had a tendency to mislead; but (per Curiam) that, as in fact they did not appear to have misled the pilot of the *G. S.*, who saw that the *G.* was not altering her course, the *G.* was not to blame.

Decision of Hill J. holding both vessels to blame, varied.

Appeal from a judgment of Hill J. in an action of damage by collision.

The plaintiff (appellant) was the Shipping Controller, the owner of the steamship *Gustav*; the defendants were the owners of the steamship *Gulf of Suez*.

The following statement of the facts is taken from the judgment of the learned judge :—

The collision took place at 8.30 p.m. on May 26, 1920, in the Mersey off Prince's Dock entrance, or perhaps a trifle further down the river. It was dusk at the time and the two ships were exhibiting lights, but their hulls were visible to one

another. The tide was ebb, with a strength of 2 to 2½ knots. The *Gustav* was a vessel of 2259 tons gross and 300 feet long, in ballast. She had left the Alfred Dock, on the Birkenhead side, and intended to cross to the east side of mid-river and then turn down for sea. The *Gulf of Suez* was proceeding up the river for Eastham to the west of mid-river. They sighted one another, both lights and hulls, at the distance of about half a mile, while the *Gustav* was issuing from the dock entrance, and the *Gulf of Suez* was somewhere off Seacombe stage. They were in collision some 600 to 800 feet off the dock wall on the Liverpool side. At the collision the *Gustav* was heading about east, nearly athwart the river, and the *Gulf of Suez* about south, nearly straight up the river. At the collision the *Gustav* had not much way, as her engines had been reversed and her starboard anchor dropped. The engines of the *Gulf of Suez* were working at full ahead. The engine movements as given in evidence were as follows: The *Gustav*, as she left the lock, put her engines at slow and immediately full speed, and was gradually increasing speed as she went. Very shortly before the collision when the ship was nearer the Liverpool side than mid-river, the engines were put full-speed astern and the starboard anchor let go. The *Gulf of Suez* was coming up at a speed of about 9 knots. She kept her speed for an appreciable time, and then the following was done with the engines—"stop," then "slow ahead," and then "full ahead." The helm action and helm signals were as follows:—The *Gustav* on leaving the entrance ported a little to counteract the effect of the ebb tide on her head as she emerged into the tideway, and then gave a short blast. What she did subsequently was not clear on the evidence, except that she gave a second short blast. According to her documents she at a later stage ported a point; but his Lordship said that he accepted the evidence of the master that after the first porting (a slight porting to counteract the tide as the ship's head came into the tideway) the helm was steadied and was not afterwards moved, and the second short blast was given at a time when the helm was steady. As the *Gustav* was leaving the lock she gave a long warning blast,

C. A. 1921

THE GULF OF SUEZ.

and her evidence was that she gave one while she was in the lock as well. Neither of these blasts was heard on board the *Gulf of Suez*. The *Gulf of Suez* was already under some starboard helm for a ferry boat when the *Gustav* was first seen. On hearing a short blast from the *Gustav* the helm was starboarded, and, on hearing a second short blast, hard a-starboarded, and when the engines were put full ahead after the stop and slow, the helm was hard a-ported. The *Gulf of Suez* gave two short blasts in reply to each of the *Gustav's* one short. The *Gustav* heard only one short, which was given in reply to the *Gustav's* first one short.

The learned judge continued as follows: "It is not seriously disputed that the *Gulf of Suez* is to blame for failure to take timely action with her engines. Assuming that on hearing the short blast of the *Gustav* she was justified in concluding that the *Gustav* was going to turn up river under port helm, and was justified in starboarding to give the *Gustav* more room for that manœuvre, yet a time came when the *Gustav* was seen to be continuing to head across river and when engine action was called for, and when to go astern would have given time to see what the *Gustav* was really intending. Instead of reversing, what the *Gulf of Suez* did was to stop and slow, and then at last to go full ahead and hard a-port to try and throw herself clear. I am advised that the *Gulf of Suez* was certainly to blame for not reversing. That fault would equally attach to her whether the two ships were under the governance of the crossing rules, or whether their conduct was to be judged by good seamanship independently of the rules."

"Whether the crossing rules applied or not has been much argued, and the argument for the *Gustav* is mainly based on treating them as applicable, for it is said the *Gustav* did keep her course by keeping a slight port helm to counteract the tide, did keep speed by gradually gathering way under engines which were already full ahead, and was bound not to reverse until the point was reached at which a collision was not to be avoided by the *Gulf of Suez* alone. Whether the crossing rules apply to ships in the relative positions of the *Gustav*

and the *Gulf of Suez* depends, in my view, upon the particular facts of the case. I have been referred to *The Sunlight* (1) and *The Llanelly* (2), and I had a similar question in *The Avocet* (unreported) which I tried in June, 1917. In my view, it all depends on the distance which the ships are from one another at the time when one of them leaves the dock entrance. I incline to the opinion that these two ships sighting one another at half a mile distance came within the crossing rules. It seems to me to depend upon this—do they sight one another at such a distance that they can each of them reasonably act under the crossing rules and so avoid collision ? These two ships at half a mile distance seem to me to be very near the line. I will assume—without finally deciding it—that the crossing rules applied, and I will inquire whether, that being so, the *Gustav* can escape blame. I have already pointed out that, whether you apply the crossing rules or not, the *Gulf of Suez* cannot escape blame. Can the *Gustav* in this case take the benefit of the crossing rules ? As she was leaving the lock entrance, coming out into the tideway—that is, before her definite direction could be apparent to the *Gulf of Suez*—the *Gustav* sounded a short blast. At that time she was porting only to counteract the effect of the tide on her head as she left the entrance; she was not taking any course for the *Gulf of Suez*, nor was she, in my view, directing her course to starboard within the meaning of art. 28. I think it was a misleading signal. No case was cited in which this had been definitely decided ; but I think if the reasoning of *The Aristocrat* (3) be looked at, it will confirm the view that I have expressed—that when a ship is merely using helm action to counteract the effect of the tide on her heading, she is not directing her course either to starboard or port, as the case may be, and that she is not justified in giving an approaching ship a signal as if she was directing her course one way or another. The Elder Brethren think it was a very misleading signal, and that a prudent navigator on the *Gulf of Suez* hearing such a signal would rightly conclude that the

(1) [1904] P. 100. (2) [1914] P. 40.

(3) [1908] P. 9.

C. A. 1921

THE GULF OF SUEZ.

Gustav was going to direct her course to starboard and turn up river, and that she wanted the *Gulf of Suez* to so understand—I do not say necessarily turn right up river, but turn on an up river heading. On the evidence given in Court, that short blast was repeated without any helm action at all, and therefore it was doubly misleading. Those signals did mislead the *Gulf of Suez*, and went far to justify the starboarding of the *Gulf of Suez*. The Elder Brethren think that a prudent navigator would, in such circumstances, rightly starboard to give more room to the *Gustav* to carry out the manœuvre of turning up river which the *Gustav* was indicating by her short blast. The *Gustav* having given these signals, which were equivalent, in the circumstances, to an intimation that she was not going to keep her course, does it lie in the mouth of the *Gustav* to say that she was bound by the crossing rules and was bound to keep her speed up to the point indicated by the rules? I think not. She had by her fault led the *Gulf of Suez* into starboard helm action, and brought about the position in which the obligation to take timely engine action to avoid collision rested upon her as much as upon the *Gulf of Suez;* and if she had reversed sooner the collision would have been avoided. I therefore am of opinion that even if it be rightly argued that, notwithstanding the short blast of the *Gustav*, the *Gulf of Suez* could have avoided the collision, yet there was continuing fault of the *Gustav* which itself contributed to the collision.

"I therefore hold that both ships by their negligence have brought about this collision and that they are both to blame."

The plaintiff appealed.

Bateson K.C. and *Darby* for the appellant. The question whether the crossing rule (art. 19) applies in the case of a vessel coming out of dock depends on the distance the vessels are apart when they are first in a position to see each other.

[LORD STERNDALE M.R. I think that must be so.]

It is unnecessary, therefore, to refer to the reported cases

C. A. 1921

THE GULF OF SUEZ.

as to when art. 19 does and does not apply; it is a question of fact in each case. It has been found in the present case that the vessels sighted each other at a distance of about half a mile; and the learned judge was right therefore in thinking that the crossing rule should be applied. If so it was the duty of the *Gustav* to keep her course and speed until the collision could not be avoided by the action of the *Gulf of Suez* alone (art. 21), and the learned judge was wrong in holding that the obligation was cast upon the *Gustav* to act earlier than she did by reason of the fact that she gave "a misleading signal." The *Gustav* was right in giving the two port helm signals, she was in fact "directing her course to starboard," because if she had not ported her helm the tide would have canted her to port. The signal was the best indication that the *Gustav* could give that she was going to pass the *Gulf of Suez* on her (the *Gustav's*) port side; and, even if technically not justifiable under art. 28, it was not misleading, for it did not in fact mislead the pilot of the *Gulf of Suez*. While the statutory presumption of fault was in existence the reported cases show that it was almost impossible for a vessel to escape being held to blame for not using her whistle to indicate her helm action: see *The Uskmoor* (1); *The Hero*. (2) In *The Aristocrat* (3) Buckley L.J. said that a vessel owed a duty to say to the other vessel by her whistle: "I am here, and I am going to take such a course that if you continue coming astern there will probably be a collision." In porting to avoid being set down river the *Gustav* was taking a course which took her across the course of the *Gulf of Suez* and she owed her a duty to indicate that fact to her.

D. Stephens K.C. and *Alfred Bucknill* for the respondents. The *Gustav* was to blame under art. 28 for sounding a signal indicating that she was altering her course when in fact she was keeping her course. In *The Bellanoch* (4) it was held that a vessel putting her engines astern, not on account of the other vessel but in order to free her propeller from mud, was not only justified in not giving three short blasts, but

(1) [1902] P. 250.
(2) [1911] P. 128, 159.
(3) [1908] P. 9, 23.
(4) [1907] P. 170.

C. A. 1921

THE GULF OF SUEZ.

that had she done so it would have been a misleading signal. This is an analogous case.

[LORD STERNDALE M.R. You still have to show, though, that by reason of the signal the *Gulf of Suez* took a course which she would not otherwise have taken.]

The pilot said that he thought the *Gustav* would turn up river and he starboarded to give her more room. Even if not a breach of art. 28 the sounding of the signals was a breach of good seamanship.

Whether the crossing rule (art. 19) is to be applied or not, the *Gustav* is also to blame for not taking action sooner. When two vessels approaching each other continue to exchange contradictory helm signals it is obvious that a position of danger is created, and the *Gustav* ought to have stopped and reversed her engines much earlier than she did.

Bateson K.C. in reply. It is the duty of the "stand-on" vessel to keep her course and speed and she is not to be blamed if in fact she waits a moment too long before acting: *The Ranza* (1); *The Huntsman.* (2)

LORD STERNDALE M.R. This is an appeal from Hill J. who held both ships to blame for a collision on the Mersey. The facts are set out in detail in his judgment. The plaintiff's ship, the *Gustav*, was coming out of the Alfred Dock on the Birkenhead side. The *Gulf of Suez*, the other ship, was bound up river. She was proceeding on her proper side, the starboard side, and was just below the Seacombe stage off the north-eastern corner of the stage, and about 600 ft. out. She was under a slight starboard helm in order to clear a ferry boat that was coming away from the stage. When she saw the *Gustav* first, the *Gustav* had just cleared the stage in this sense, that the vessel near the stage was able to see her. The *Gulf of Suez* could not see her, she said, when she was actually coming out of the dock, because the stage obscured the view; and, if she could see her clear of the stage from where she was, the *Gustav* must, I think, have been at that time clear of the dock.

(1) (1898) 79 L. J. (P.) 21*n*. (2) (1911) 11 Asp. M. L. C. 606.

The first question that arises upon those facts is whether the crossing rule applied to these ships. I agree with Hill J., that that must always depend upon the distance at which the ships see one another. If the *Gulf of Suez* had sighted the *Gustav* only when she was just coming out of the dock, and the *Gulf of Suez* was close up to her, it would be very difficult to say that the vessels were on crossing courses. I agree also with the learned judge that it is rather a near thing in this case, but I also agree with him in thinking that the side of the line on which the case falls is that at the time they sighted one another the crossing rule did apply, because, as I have said, at the time the *Gulf of Suez* sighted the *Gustav*, the latter was clear of the dock and was beginning to cross the river. She would have to cross the river to get on to her right side, if she was going down, as I think she was.

The learned judge has held the *Gustav* to blame substantially —indeed I think I am right in saying wholly, because the only part of the blame he attaches to her follows upon it—for giving a misleading signal, and thereby inducing the *Gulf of Suez* to do what she did; which was, instead of letting the *Gustav* cross her by stopping or coming inside her, she starboarded and went on the Liverpool side of the river, and the collision happened on the Liverpool side of the river. I think there is no question that the *Gulf of Suez* was to blame for the reasons that the learned judge has given; but the question is whether the *Gustav* was to blame. The learned judge has held her to blame because she gave a misleading signal, and so produced all the mischief, or, at any rate, a considerable part of the mischief. What she did was this: When she was coming out of the dock, of course her starboard bow would be caught by the ebb tide; and she ported a little to counteract the tide, and she blew one short blast. After that the learned judge has found that she steadied and that she continued to cross in the same direction. She may have steadied on a little port helm; she may have been carrying a little port helm all the way; but she did not port any more, and she did not alter her direction. She continued to cross the river. It is true

C. A. 1921

THE GULF OF SUEZ.

Lord Sterndale M.R.

that the plaintiff's documents say that after that first porting to counteract the tide the *Gustav* altered a point under a port helm. The learned judge has accepted the evidence in preference to the documents, and I think in a considerable measure, because not only did the witnesses from the *Gustav* say that they did not alter their course at all, but because the witnesses from the *Gulf of Suez* say the same; and they say that, whatever helm signals the *Gustav* blew, it was dusk and still light enough to see the hulls, and they saw she was going across the river, and was not altering her course to starboard. But the pilot and the master both say that on hearing those blasts they thought that she was going up the river, going south, and that she was porting for that purpose. I should have thought the pilot in charge of the *Gulf of Suez* would have known that it was necessary to port a little on an ebb tide in order to get across the river and to counteract the tide.

It has been strongly maintained on behalf of the appellant that the *Gustav* was right in blowing those signals: first, because she was counteracting the tide; and, secondly, because she was still counteracting the tide although proceeding in the same direction as that on which she had steadied; and as her helm was then aport, it was right to give a port helm signal. It is not in the view I take of the case necessary to decide the point; but, as at present advised, I do not agree with those contentions; and I only say that I am fortified in that by the opinion of a nautical assessor. I doubt very much whether when she blew the first time she could have been said to be altering her course, because she was not on a course at all, she was merely correcting her heading. Two justifications are given for giving the second short blast: one is that the vessels were—as the learned counsel said—talking to one another, and they were talking to one another, using, as he says, very likely the port helm signal to mean this; not "I am directing my course to starboard," but "I am going to pass you on my port side." I cannot accept that as a justification. The regulations have fixed what the meaning of the signal is, and I cannot think that it is right

or admissible for masters or pilots to use these signals with a different meaning. If they are in the habit of doing so, and each understands what the other means by the signal, no harm may result, but it does not in my opinion make it a proper use of the signal; and I think in saying that I am only following what has been said in other cases. The statement in Mr. Stuart Moore's Rules of the Road at Sea on art. 28 seems to be accurate; he says at p. 60 with regard to what are called the port and starboard helm signals: "It must be remembered, however, that the first two signals are only for the purpose of indicating that a vessel is, at the moment the signal is given, directing her course to port or starboard. They do *not* mean that the vessel is going to pass on a particular side; nor that her helm is placed in a particular way; nor that the vessel will continue on the course she is taking." The object of them is to let the vessel which has to manœuvre for the one giving the signals know whether that vessel is altering her course or whether she is not; they are not for the purpose of letting the other vessel know what helm action she may be taking to continue on the same course; that does not matter to the other vessel; she has to manœuvre for a course and not for any means which may be taken to preserve the course. As the result in this case of the port helm was that the *Gustav* continued on the same course, in my opinion the second port helm signal was wrong. I am advised, and I agree, that probably the right thing for her to do on both occasions if she wanted to call the other vessel's attention at all, was to blow a warning blast, and not to blow a signal which indicated that she was doing something that she was not doing. That was a misleading signal in this sense, that it was a signal which had a tendency to mislead, and, if it had in fact misled, of course the learned judge would have been quite correct.

If the old principle of statutory presumption of fault existed, there might be a considerable amount to be said about that signal, but it does not; and therefore, in order to hold the *Gustav* to blame for giving that signal it must be shown not only that it was a misleading signal in the sense that I have

C. A. 1921

THE GULF OF SUEZ.

Lord Sterndale M.R.

mentioned—namely, a signal having a tendency to mislead, but it must be shown that the signal did in fact mislead and the misleading was the cause of or a contributing cause to the collision. Now that is where I think the defendants' case against the *Gustav* is not established. In the first place, the evidence is quite clear from the *Gulf of Suez* that, although they heard the signals from the *Gustav*, they saw that she was not altering her course, but was proceeding right across the river; and, in the second place—or perhaps I ought to have put it in the first place—the pilot who was in charge of the *Gulf of Suez* says quite clearly and distinctly that his manœuvres were not affected by those signals. He did say, and so did the master, that they thought the vessel was going to the southward when they heard the whistles; but they discovered long before the collision that she was doing nothing of the sort, for they saw her, as I say, going across the river. The pilot was asked in re-examination these questions: "(Q.) I asked you about the port helm signal that this vessel blew, and what you gathered from it? (A.) Well, I was under the impression that he would still keep on his port helm and go well to the southward." I do not quite know, as I have said, why a Liverpool pilot who knows the necessity of porting a little coming out of the Alfred Dock on an ebb tide to counteract the tide could have formed that opinion at all; but he says he did. "(Q.) Did that impression in your mind have any effect upon your manœuvres? (A.) No" —then he goes on—"only that if he wanted to come to starboard, he had sufficient room over to port or starboard, whether he was South or whether he was bound North." Now when you introduce after the word "No" something with the words "only that," you expect that there will be some qualification upon the "No"; but, to my mind, whatever they mean, the words that follow the "No," although introduced by the words "only that," do not qualify the answer "No" at all; and the learned counsel appearing for the *Gulf of Suez* agrees with me that they do not qualify the word "No." So that, in addition to the fact that the witnesses from the *Gulf of Suez* say that whatever

the signals were, they saw she was not altering and was going straight across the river, there is the distinct and positive statement by the man in charge of the navigation of the *Gulf of Suez* that they did not affect his manœuvres at all. In those circumstances it seems to me quite impossible to say that these signals, although in my opinion they were wrong, were a contributing cause of the collision. The man who is said to have been misled by them says he was not misled by them, in this sense, that he was not led into doing anything that he would otherwise not have done, or into not doing anything that he would otherwise have done; his manœuvres were not affected by those signals at all. But there is also another fact. Although these signals had been given shortly before the collision—for the whole thing happened in a short time—their effect was gone sufficiently long before the collision for the pilot and those on board the *Gulf of Suez* to have corrected any wrong impression that might have been induced by them. Therefore, on that ground, on which the learned judge held the *Gustav* to blame, I regret to say that I cannot agree with him, because it seems to me established by the evidence that the signals had in fact no misleading effect, whatever their misleading tendency might have been.

There is another point made against the *Gustav* which was made below, although I do not think the learned judge has dealt with it. The respondents' counsel after contending that the crossing rule did not apply and that the signal was misleading, said that putting those contentions on one side and assuming that the crossing rule applied and that the signal did not mislead, still the *Gustav* was to blame for not having done something to avoid the collision, and that she ought to have stopped and reversed before she did. The facts as to this are as follows: The *Gustav*, as she came out of dock, had blown a long warning blast which was heard a very considerable distance. Those on board the *Gulf of Suez* say they did not hear it, and that is one part of the blame which they sought to attach to the *Gustav*. They did not specifically allege any fault against her as regards the misleading

C. A. 1921

THE GULF OF SUEZ.

Lord Sterndale M.R.

signal in their pleadings, and, although I think the pleading probably covered it, it is of importance that there was no such allegation, because it shows the matter was not considered an important one. After blowing those warning blasts, the *Gustav* came out and blew the two port helm blasts that I have mentioned. The *Gulf of Suez* on two or three occasions blew the starboard helm signal, and continued to starboard, and was seen by the *Gustav* to be continuing on her starboard helm. The *Gustav* said that they did not hear any starboard helm signal; they heard a port helm signal from her. The learned judge has found, and I think quite rightly, that the *Gulf of Suez* never blew a port helm signal, and that she continued to blow starboard helm signals, and the two vessels went on until they had approached one another closer, when the *Gulf of Suez* stopped. The *Gustav* still went on, and the *Gulf of Suez* then put her engines ahead again, and came round under a hard a-port helm, and so the collision happened. It is said against the *Gustav* that those on board her ought to have heard the starboard helm signals—and I think they ought, I do not know why they did not—and if they heard a vessel blowing a starboard helm signal and going off under a starboard helm in such a way that if their courses were continued they would meet, the *Gustav* ought to have stopped earlier than she did. Now if I am right in saying that the crossing rule applies, it was the duty of the *Gustav* to keep her course and speed, and I think it is very important that no rule should be laid down by this Court or any other Court which would throw any burden or give any encouragement to the stand-on ship to alter her course or to act in any way before she is absolutely obliged to do so. The statement as regards art. 21 and the proviso thereto in Mr. Marsden's Collisions at Sea (7th ed., p. 394) seems to be quite correct: "This rule is perhaps the most difficult of all the regulations for seamen to adhere to. It must always be a matter of difficulty for the officer in charge of the vessel which has to keep her course and speed to determine when the time has arrived to take action, for if he acts too soon, he may disconcert any action which the other vessel

may be about to take to avoid his vessel, and be blamed for so doing, and yet the time may come when he must take action. The precise point when he should cease to keep his course and speed is difficult to determine, and some latitude is allowed him in determining this"—those last words are taken from the judgment of Lord Gorell in *The Albano* (1)—"and when it is shown that he was carefully watching the other vessel and endeavouring to do his best to act at the right moment, he will not be held to blame, though it afterwards appears that he waited too long or acted too soon." Those words are taken from the judgments in *The Huntsman* (2) and *The Ranza*. (3) I think it is important that those principles should be attended to.

What was the position here? There is distinct evidence from the *Gustav* to this effect: the pilot of the *Gustav* is saying that he saw the other vessel starboarding, and then he is asked: "Then did he keep on his starboard helm or did he change it? (A.) He kept on his starboard helm." So that whether the *Gustav* heard the two blasts or not, she knew the other vessel was under starboard helm. "(Q.) And then what was the next thing? You went on till when? (A.) Well, until I thought it was time for me to do something to try and avoid a collision, I came full speed astern. (Q.) Up to the time you came full speed astern, could he quite easily have ported and got away under your stern? (A.) Most decidedly." I do not know that there is any evidence to displace that. There is another matter which is of great importance, and I agree with Mr. Bateson, of much greater importance than any calculations or guesses as to time and distance. It is found by the learned judge that at the time of the collision the *Gustav* had very little way on her; she was going, I think, about 5 knots before that. I do not think it is found one way or the other, but there is evidence that not only did she go astern, but she let go her anchor and her anchor held, she had not to pay out any more chain. Both those things show

(1) [1907] A. C. 193. (2) 11 Asp. M. L. C. 606.
(3) 79 L. J. P. 21*n*.

C. A. 1921

THE GULF OF SUEZ.

Lord Sterndale M.R.

that she must have reversed at quite an appreciable time and distance before the collision, and that she must have done a good deal towards taking her way off, because she had, as the learned judge finds, very little way on; and, secondly, if she had had much way, her anchor would not have held, as it did. I think that is sufficient to show that, giving her the reasonable latitude which it is said she ought to have, she did not delay acting too long. It has been laid down over and over again that a stand-on ship is not to act so long as the other ship can by her own action avoid the collision. As I have said, there is evidence clear and distinct, and I do not think there is any to the contrary, that up to the time the *Gustav* reversed her engines the other vessel could have avoided the collision by her own action, and I think there are good grounds for saying that when she had once stopped, if she had not put her engines on ahead again, there would have been no collision at all.

For these reasons I think the *Gustav* was not to blame on that head either, and the learned judge's judgment should be varied by finding the *Gulf of Suez* alone to blame. That will carry costs both here and below.

ATKIN L.J. I agree. I think the first question which is to be determined is whether or not these two vessels were crossing vessels within the meaning of art. 19. The learned judge has found that they were, after some doubt, and I think that he was right in so finding. It appears to me from a survey of the circumstances, the place at which each vessel first saw the other, the position in fact which was obvious at that particular moment, that the vessels were crossing and they were crossing within the meaning of the rule so as to involve risk of collision, which indicates a period before the risk has, so to speak, actually matured; it means a period at which there is a probability that there will be a risk of collision if precautions are not taken. To my mind, therefore, the *Gustav*, intending to go across the river, proceeding across the river from the Birkenhead side, and the *Gulf of Suez*

coming up the river, were obviously crossing vessels and crossing so as to involve risk of collision. It follows from that that there was an obligation under art. 21 upon the *Gustav* to keep her course and speed. It appears to me that that obligation rested upon her, and rested upon her until a period arrived at which it was clear that the collision could not be avoided by the action of the *Gulf of Suez* alone. I agree entirely with what has fallen from the Master of the Rolls as to the importance of maintaining that rule, and the danger that there would be in giving any latitude to the stand-on vessel, unless the emergency had arisen which allowed her to depart from the rule, and it appears to me that, leaving out of account for the moment the further question that arises as to a misleading signal, if one had merely to consider the question of these vessels crossing, the learned judge has not found that the *Gustav* under those circumstances took action too late, and that there is no evidence upon which we ought to come to that finding. On the contrary, in view of the evidence as to what happened when she did take action, and the fact that by the time the collision came about she had almost entirely taken off her way, or at any rate had reduced it very considerably, I think it is impossible to say that the *Gustav* in that respect was to blame.

The only other question that arises is the suggestion that as between these two vessels the crossing rule must be taken not to have applied, because the *Gustav* had misled the *Gulf of Suez* into believing that the *Gustav* was not crossing but was in fact proceeding in a different direction—namely, up the river. That raises the question of these signals. For my part, on this aspect of the case I do not think that very much importance ought to be attached to the signals, because both vessels were able to observe one another; it was dusk, it was not dark, and they both agree they could see each the hull of the other vessel, and could see what in fact was being done. The *Gustav*, coming out of the dock, in order to obviate the effect of the ebb tide kept a slight port helm,

C. A. 1921

THE GULF OF SUEZ.

Atkin L.J.

and, inasmuch as she had put her helm to port, blew one short blast, meaning: "I am directing my course to starboard." It is said that that was a wrong use of the signal, because in fact she was not directing her course to starboard, but was keeping straight on, and further that in any case it would be a wrong use of the signal at a time when no alteration was given to the helm at all, in respect of the second blast. It does not appear to me in this case to be necessary to decide that point. I am not saying at all that I differ from the view that has been expressed by the Master of the Rolls or from the result upon it, but I prefer not to decide whether or not it would be a wrong use of the signal if in fact a navigator whose ship would otherwise be directed, I will say to port, signalled that he was using his port helm so as to keep the vessel in a direction in which she would not be going if it were not for the use of that port helm. That I do not wish to decide. Nor do I wish to decide the further point as to whether a use of the signal which does not mean that which is indicated by the rule is in fact in itself an infringement of the rule. The rule says that a vessel shall indicate her course by the following signals: One short blast to mean: "I am directing my course to starboard." Assume that a vessel in the course of navigation blows one short blast not meaning "I am directing my course to starboard"; it may well be said, I think, that that is not an infringement of the rule, because the rule only indicates what she shall do if she is directing her course to starboard. I am far from saying that a use of these signals in a manner not contemplated by the rules themselves may not be an error in navigation and such an error in navigation as to amount to negligence, very likely it may be; all I am suggesting is that it may be a different question, and that, instead of establishing under those circumstances a breach of a statutory obligation, the litigant would have to establish that there was in fact negligence—i.e., faulty navigation amounting to negligence—on the part of those responsible for the ship. But I leave that matter there; I do not think it is necessary to decide it, because the case

that is made is that this signal did in fact mislead those responsible for the navigation of the *Gulf of Suez*, and that must mean the pilot, so as to lead him to believe that the *Gustav* was not in fact a crossing vessel, and so, in that way, prevents the *Gustav* from relying upon the crossing rule. I think the answer, with great respect to the learned judge below, is that this signal did not have that effect. I have already pointed out that both vessels were able to see one another during the whole course of the proceedings, and see what was happening, and it appears to me very difficult to suppose that the helm signal in itself would be sufficient to mislead the navigator of the *Gulf of Suez* into taking a wrong course. But quite apart from that, the signal that was given, if it meant anything at all, meant: "I am directing my course to starboard." It might however mean, as the judge pointed out: "I am going to cross the river, but I am going to one of the Docks across the River which are South of the Landing Stage," in which case a port helm would be necessary. It might mean that the vessel was navigating under port helm to avoid some obstruction or for some other purpose which might not be evident to the other vessel. It might mean that the vessel was going, as the judge said, under a hard a-port helm—going right up the river. I should not have thought that would be a probable measure at that time and in that state of tide, though it was a possible measure. But in any case, if in fact there was a doubt, and there were two equally possible—I think one may say equally probable courses—that might be taken under that helm signal, it seems to me that it would have been wrong for the navigator of the *Gulf of Suez* to make up his mind that it only meant the one thing—namely, that the *Gustav* was going up the river. But, quite apart from that, it appears to me that upon the evidence the attack on the part of the defendants entirely fails, because I read the evidence of the pilot as a statement that in fact he was not misled. He was asked whether the signal had any effect upon his manœuvres, and he said No; and he said No, it appears to me, without any material

C. A. 1921

THE GULF OF SUEZ.

Atkin L.J.

qualification, and, if that is the true effect of his evidence, in my opinion there is no evidence upon which the learned judge could find that the action taken by the *Gustav* had any effect so as to prevent the *Gulf of Suez* from being responsible for her undoubted and admitted negligence.

I think for these reasons that the appeal should be allowed, and the order should be made as announced by the Master of the Rolls.

YOUNGER L.J. I am of the same opinion on all the points dealt with and disposed of by my Lord and the Lord Justice.

Appeal allowed.

Solicitor for the appellant: *The Treasury Solicitor.*

Solicitors for the respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

E. C. M. T.

ADMIRALTY.

1921
May 3, 4, 27.

THE TROMP.

Admiralty—Carriage of Goods—Damage to Cargo—Bill of Lading—"Shipped in good order and condition"—"Weight, quality, condition and measure unknown"—Shipment of Potatoes in wet Bags—Estoppel.

The plaintiffs were the indorsees of a bill of lading for a cargo of potatoes shipped on board the defendants' vessel. Under the bill of lading the potatoes were described as "shipped in good order and condition," but at the foot of the bill of lading there were the qualifying words, "weight, quality, condition and measure unknown." The potatoes, to the knowledge of the defendants' master who signed the bill of lading, were shipped in wet bags and in a damaged condition:—

Held, (i.) that, although the defendants had guarded themselves by the qualifying words from making any representation as to the internal condition or quality of the potatoes, they had represented the external condition of the bags and were estopped from denying that the bags were dry when shipped; and (ii.) that, as the main cause of the rotting of the potatoes was the wetness of the bags, the damage must be attributed to the treatment of the cargo by the defendants' servants after shipment.

ACTION IN REM in respect of damage to cargo.

The plaintiffs were Jefferson and Gosling, merchants of Hull; the defendants were the owners of the Dutch sailing vessel *Tromp*. The facts fully appear from the judgment. Shortly stated they were as follows:—

In May, 1920, a cargo of potatoes in bags was shipped at Gothenburg on board the *Tromp* for delivery at Hull under a bill of lading by which the master acknowledged that the goods were shipped in good order and condition and agreed to deliver them in like good order and condition at Hull to the shippers' order or assigns. At the foot of the bill of lading there were the printed words "quality, condition and measure unknown" and, before authorizing the master to sign, the ship's agents added the word "weight," making the clause read "weight, quality, etc., unknown." The potatoes, to the knowledge of the master, were shipped in wet bags, and were delivered to the plaintiffs, who were the indorsees of the bill of lading, in a pulpy and rotten condition, and part of the quantity alleged to have been shipped

1921

THE TROMP.

was not delivered at all. The plaintiffs claimed damages in respect of the defendants' alleged breach of contract and/or duty to deliver the goods in good order and condition.

D. Stephens K.C. and *Clement Davies* for the plaintiffs. By the presentation of a clean bill of lading to the plaintiffs the defendants represented that the potatoes were shipped in good order and condition when received on board. That was their representation to the plaintiffs when the plaintiffs, through their Swedish bankers, bought and took up the bill of lading; and the defendants are estopped from denying that the potatoes were in good condition when shipped: see *Compania Naviera Vasconzada* v. *Churchill & Sim* (1), where Channell J. in the case of a cargo of sawn timber, expressed to be "shipped in good order and condition . . . . quality and measure unknown," held that the shipowners were estopped from denying that it was shipped in good condition, and he distinguished the meanings of "condition" and "quality," holding that the former related to external appearance: see also *Martineaus* v. *Royal Mail Steam Packet Co.* (2), where the qualifying words were "weight, contents . . . . unknown," and *Crossfield* v. *Kyle Shipping Co.* (3) The actual words cannot make any difference to the question whether there is or is not an estoppel; the sole question is whether the plaintiffs have acted on the alleged estoppel to their detriment. There were two untrue statements in the bill of lading—namely, that the goods were in good condition and that the condition was unknown. The master of the *Tromp* knew the condition in which the goods were shipped and that it was bad.

[THE PRESIDENT. Do not the contradictory words "shipped in good order and condition" and "condition unknown" make the bill of lading meaningless? Can there be an estoppel in such a case?]

Yes, because on the face of it, it is a clean bill of lading; the words "condition unknown" refer to something different

(1) [1906] 1 K. B. 237. (2) (1912) 17 Com. Cas. 176.
(3) [1916] 2 K. B. 885.

than the words "shipped in good . . . . condition." The latter refer to what a shipmaster can see for himself, the obvious external condition, whereas the words "condition unknown" refer to the actual state of the goods only to be ascertained by a close inspection: see *Compania Naviera Vasconzada* v. *Churchill & Sim.* (1)

R. A. Wright K.C. and *Bisschop* for the defendants. In *Compania Naviera Vasconzada* v. *Churchill & Sim* (1) the word opposed to "condition" was "quality." In the present case the word "condition" occurs in both clauses and they neutralize each other. The defendants have protected themselves by the words "condition unknown" and there is no warranty that the goods were shipped in good order and condition and, therefore, there is no estoppel. In *The Ida* (2) the Privy Council held that a bill of lading stating that the goods were shipped in good order and condition, but indorsed "quality and quantity unknown," did not admit as against the shipowners that the goods were shipped in good condition: see also *Craig* v. *Delargy* (3) and *New Chinese Antimony Co.* v. *Ocean Steamship Co.* (4), where the bill of lading stated that 937 tons of ore were shipped, and there was a marginal note "quantity said to be 937 tons" and, in the qualifying clause, the words ". . . . weight unknown," and it was held that the bill of lading did not afford even prima facie evidence that 937 tons were shipped.

Further, there can be no estoppel because, on the facts, the plaintiffs must be held to have had knowledge through their agent, Appelgren, of the condition of the goods when shipped; and they were in effect the charterers of the vessel and the owners of the goods before they were put on board.

D. Stephens in reply. On the facts Appelgren was an undisclosed principal and not the plaintiffs' agent to inspect the goods. *The Ida* (2) was decided on a question of contract and no statements false to the knowledge of the master were made in that case.

Cur. adv. vult.

(1) [1906] 1 K. B. 237.
(2) (1875) 32 L. T. 541.
(3) (1879) 6 R. 1269.
(4) [1917] 2 K. B. 664.

1921

THE TROMP.

May 27. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: The plaintiffs are merchants at Hull and have brought this action against the defendants, the owners of the Dutch sailing vessel *Tromp*, to enforce a claim in respect of loss and damage alleged to have occurred in course of the transit by sea from Gothenburg to Hull on board the *Tromp* of a cargo of potatoes. The plaintiffs sue as owners of the cargo and as indorsees of a bill of lading. The *Tromp* was arrested in the suit and in due course released on bail. The resort of the plaintiffs to the jurisdiction of the Court in rem is material to various questions which arose at the hearing.

The plaintiffs found their action upon the acknowledgment in the bill of lading of shipment on board the *Tromp* of 2923 bags of potatoes in good order and condition and the proved fact that a large part of the potatoes were delivered at Hull, as the statement of claim alleges, "wet, soft, pulpy, rotten and greatly damaged," and part were not delivered. The defendants put in issue the alleged terms of the bill of lading. They allege also that the plaintiffs were the charterers of the *Tromp* when the bill of lading was issued, and had by their agents required its issue by the master with knowledge that 2923 bags were not shipped and that the potatoes shipped were not in good condition, and under an indemnity against liability on the part of the defendants. They further allege that the plaintiffs were the owners before shipment and the shippers of the potatoes and undertook the stowage of the same, and by their agent so stowed the potatoes that damage ensued upon the voyage. By way of counterclaim the defendants claim substantial damages for the arrest and detention of the vessel and consequent loss of charter. At the hearing, however, there proved to be no ground for the allegation of loss of charter, and the counterclaim was not seriously maintained.

Although the cause of action of the plaintiffs in rem depended upon estoppel as to the state of the potatoes when shipped and the quantity shipped, evidence was given by both parties as to the actual state of the cargo at shipment.

A large proportion of the bags and some part of their contents had become wet in course of inland transit in Sweden and this wetness was the cause of the damaged condition in which the cargo arrived. The state of the cargo was known at the time of shipment to the shippers, to the persons engaged in the delivery and stowage, to the master of the *Tromp*, and to the defendants' agents in Gothenburg, and all of these persons knew that the potatoes by reason of the state of the bags would inevitably arrive at Hull in a damaged condition. They also all knew there was a shortage in quantity.

Assuming the relations of the parties to be governed by English law and the plaintiffs to have been unaware of what was done in Gothenburg, various causes of action were no doubt open to them. The plaintiffs, however, in order to avail themselves of the power of arrest of the ship under the jurisdiction of the Court in Admiralty, elected to proceed against the defendants in rem for alleged default of the defendants as shipowners in course of the carriage of goods by sea. Their success in the action must depend therefore upon their right to rely upon an estoppel, and to hold the defendants accountable upon a supposititious state of facts. It would obviously be improper as against defendants brought into the jurisdiction by the arrest of their property to have regard to possible claims of the plaintiffs other than those in respect of which the action was brought.

The plaintiffs were and are importers and exporters of and dealers in fruit and vegetables. Oscar Theodor Appelgren was a commercial agent at Gothenburg, who before the events here in question, had sold fruit on commission in Sweden and done no other business on account of the plaintiffs. "The Baltic and North Sea Traffic" was the name of a Swedish firm carrying on business at Gothenburg (inter alia) as forwarding and shipping agents. I shall call them the Baltic Agency. The potatoes in question were before shipment the property of a grower at Saternas in South Sweden and were offered for sale and sold on his behalf by one Per Carlander in Stockholm. Carlander supposed that he was selling to the plaintiffs. In a letter to the Baltic Agency

1921

THE TROMP.

The President.

he described the whole parcel as "300,000 kilos potatoes which have been sold to Messrs. Jefferson & Gosling, Hull, by Saternas Ejendam (sic), through Mr. Appelgren, for which parcel according to arrangement you are to pay and forward same to purchasers." Appelgren's authority in the transaction, and the capacity in which he in fact conducted it, were much in dispute in the case. The bargain he made with the grower's agent was for delivery f.o.b. at Saternas at a price of 6.50 kroner per 100 kilos payable in cash against bill of lading at Gothenburg after bill of lading had been signed by outward steamer. Plaintiffs' purchase was at 6.50 kroner per 50 kilos f.o.b. at Gothenburg.

The matters of fact in dispute included these: When did the plaintiffs become owners of the potatoes? In what capacity and on whose behalf did Appelgren deal with the potatoes? What actual or implied authority had he as agent for the plaintiffs in and about the shipment and despatch of the goods? Did he charter the defendants' vessel on behalf of the plaintiffs? Did he procure the bill of lading for the goods as plaintiffs' agent? Were the Baltic Agency plaintiffs' agents; and did they as such agents procure the bill of lading and agree to indemnify the defendants against claims arising from the condition of the cargo at shipment?

On April 10, 1920, Appelgren, as the agent of an undisclosed principal, offered to the plaintiffs 300 tons of potatoes f.o.b. Gothenburg in bags of 50 kilos at a price inclusive of commission for payment at Gothenburg, against inspection certificate and bill of lading. After inspection of the potatoes by an agent of theirs who was in Sweden, plaintiffs on April 20 accepted Appelgren's offer of potatoes at 6.50 per 50 kilos, f.o.b., sacks and commission included. The commission to which the contract referred was, as the plaintiffs supposed, a commission payable to Appelgren. Appelgren directed them on April 22 that a credit for the price of the potatoes was to be opened in favour of the Baltic Agency at a bank in Gothenburg, and the plaintiffs accordingly through their bankers opened a credit with the Scandinaviska Kreditaktiebolaget "for an amount of up to kr. 39,000 to

be paid against handing in full set of bills of lading made out to order and invoice of 300 tons of potatoes in sacks of 50 kilos each at the price of 130 kr. per 1000 kilos or pro rata." It was an implied term of the credit that payment should be made against clean bills of lading, and the plaintiffs supposed that the Baltic Agency were to receive payment as or on behalf of the vendor of the goods.

While the plaintiffs' bargain for the potatoes was under negotiation they telegraphed to Appelgren inquiring whether he could secure a small steamer to convey the potatoes to Hull. He secured space for 70 tons on board a Wilson liner, the *Novo*, at a rate of freight of 50 kroner per 1000 kilos payable on ship's arrival at Hull and shipped 67 tons on that vessel. They pressed for despatch of the remainder, and he telegraphed various statements as to possible modes of shipment. Then on May 15 he chartered from the agents of the defendants the sailing vessel *Tromp*, and on May 17 telegraphed to the plaintiffs: "Only shipping *Novo* 67 tons remainder will be shipped Wednesday/Thursday by sailer *Tromp*." He further telegraphed: "Instruct Bank to prepay freight for about 135 tons sailer *Tromp* 60 crowns per ton." The defendants telegraphed expressing dissatisfaction, but upon being informed that the *Tromp* had been secured and that the potatoes were alongside, they acquiesced in the situation. At Appelgren's instance they opened a credit at Gothenburg for payment of freight at the specified rate against manifest and receipts. The credit was opened, as Appelgren suggested, in favour of the Baltic Agency. Upon completing his arrangement for purchase of the potatoes Appelgren agreed with the Baltic Agency for transport of the same by lighters from Saternas to Gothenburg, and delivery there on board ship. From evidence given by him and by Eric Douglas Franck, an official of the Baltic Agency, it was clear that they and he alike had full knowledge of his position in the business and of his actual relationship to the plaintiffs.

The potatoes were forwarded to Gothenburg in three parcels. The first parcel was shipped on board the *Novo* in sound

1921

THE TROMP.

The President.

condition, and discharged sound at Hull. No question arises with regard to them. The cargo of the *Tromp* consisted of the other two parcels.

Before and during the loading of the *Tromp* the plaintiffs sent to Appelgren telegraphic requests to do a variety of things on their behalf in relation to the shipment. They authorized him to secure tonnage for the potatoes and ratified his action in chartering the *Tromp*, directed him to insure, to inspect the potatoes as to condition, to see to the stowage and secure efficient ventilation, to direct the master as to the voyage, to promise him a gratuity for good dispatch, and to arrange for towage out of Gothenburg and into Hull. They directed him also to instruct the Baltic Agency to consign the *Tromp* to a firm at Hull whom they named. These various directions the plaintiffs apparently gave to Appelgren without any arrangement between them for his acting generally as their agent and in the expectation that he would be ready to carry out their instructions in order to earn his commission.

Appelgren chartered the *Tromp* on May 18, 1920, to proceed from Helsingborg to Gothenburg and there load under deck a minimum cargo of 130 tons of potatoes in bags with liberty to ship a full cargo; freight to be payable in advance on signing bills of lading; stevedore employed by captain to be approved by shippers; the master to sign bills of lading at any rate of freight without prejudice to the charterparty, subject to adjustment in final payment of the freight. Borlind Bersen & Co. of Gothenburg made the charter on behalf of the owners.

The loading of the *Tromp* extended over five days—May 21 to May 25. On the first day, after loading had gone on for some time, the master called the attention of Appelgren and Franck to the wet condition of the bags and refused to be responsible for receiving the potatoes on board. Thereupon Appelgren stated that he was the buyers' agent and would take the responsibility. From that time the loading continued under his supervision exercised personally or by Franck. He also, through the Baltic Agency, employed workmen to expedite the work. The ship's log correctly records the

1921

THE TROMP.
The President.

master's view of the transaction in these words: "Cargo consisted of potatoes stowed in bags which however were so wet that the captain protested against having them on board, whereupon the shippers continued the loading at their own responsibility."

The quantity of potatoes delivered at the ship's rail was 2923 bags. From time to time bags which were thought altogether too wet for stowing were put aside to dry. Ultimately 2849 bags were placed in the hold, and 74 were returned into lighters.

The facts as to the signature of the bills of lading were much discussed in the case. When the lighters arrived alongside the *Tromp* on May 29, 1920, the manager of the Baltic Agency and Appelgren sought to induce her master to sign bills of lading for the potatoes, although none were on board his vessel. For this purpose Appelgren signed a form of indemnity in the words following: "I hereby agree not to hold you responsible for any damage or loss incurred through your handing over to me clean signed bills of lading for the sailing vessel *Tromp* for 2923 sacks of potatoes from Gothenburg to Hull although the said cargo has not yet been shipped." The master of the *Tromp* refused to sign bills of lading for cargo which was not on board. When the loading of the *Tromp* was complete the difficulty as to bills of lading became acute. On May 26 the master met the Baltic Agency's manager at their office. The Baltic Agency knew that payment of price and freight would only be made at the bank against bills of lading which did not disclose the condition of the cargo. The master knew also that payment of freight would only be made against such bills. His account of what took place at the interview was that when the Baltic Agency produced a clean bill of lading, he started to write his remarks upon it. They told him a clean bill of lading was necessary. Some conversation then took place as to his writing his remarks on the mate's receipt. Then, as he said, they "spoke of an indemnity." The master consulted Borlind Bersen & Co., the local agents of his owners. They knew the Baltic Agency, and as the master stated: "said it was all well"; and filled

1921

THE TROMP.

The President.

in a form of indemnity for signature by the representative of the Baltic Agency to the following effect: "We hereby undertake to hold Captain Berner and/or any other concerned free from all responsibility and/or liability for compensation which may eventually arise owing to his having signed our bills of lading for 2923 bags of potatoes, 140,304 kilos per sailer *Tromp*, May 26, 1920, although the mate's receipt states 74 bags less in dispute, cargo partly wet and stowed into the ship by the shippers. It is a special agreement that we immediately shall compensate Captain Berner any deduction in the freight and/or compensation for liability which may be made in consequence of the above-mentioned remarks." This undertaking was duly signed by the representative of the Baltic Agency and thereupon the making out of the bills of lading proceeded.

The bill of lading in its printed form acknowledged shipment of "in good order and condition by the Baltic and North Sea Traffic of Gothenburg . . . . 2923 bags of potatoes, 140,304 kilos . . . . to be delivered in the like good order and condition at Hull . . . . unto order or assigns, he and they paying freight for the same as per charterparty dated 15th May, 1920, all the terms and exceptions contained in which charter are herewith incorporated." At the foot of the bill of lading and forming part of its printed contents were the words "quality condition and measure unknown." Before authorizing the master to sign, the ship's agents added to these qualifying words the word "weight," thereby making the qualifying clause to read "weight, quality condition and measure unknown."

As soon as the master of the *Tromp* had signed the bills of lading he and the representative of the Baltic Agency went together to the bank where the purchase money of 2923 bags of potatoes, kroner 18,239.52, and the amount of the freight of the same, kroner 8418.24, was paid them on behalf of the plaintiffs in exchange for the bills of lading and the receipted invoices for goods and freight. The master of the *Tromp* admitted upon cross-examination that he knew the bill of lading was untrue, as to the quantity and condition

of the cargo, and that "it was not all right." Appelgren was not present on May 26, but he knew and approved what was done by the Baltic Agency. They did what he and they had intended. On the following day he learned the exact details of their action. He discussed with them the fact that the bill of lading acknowledged receipt of 74 bags which had not been shipped, and in respect of potatoes not shipped and wet bags shipped he arranged that they should deduct from the vendor's price the value of 350 bags. On the arrival of the *Tromp* at Hull, in answer to indignant messages from the plaintiffs as to the rotten condition of her cargo, he sent a variety of disingenuous statements, none of which revealed the actual state of affairs. The Baltic Agency was in extreme pecuniary difficulties, but he got from them the amount of his expected profit on the business, 5000 or 6000 kroner; they retained for their own use the amount of their account against Appelgren, and the balance of the sum received from the bank remained in their hands as a debt due to the grower of the potatoes, when shortly afterwards they became bankrupt. The financial position of the Baltic Agency and of Appelgren, and the situation in point of domicil of the various parties concerned are sufficient to explain the election of the plaintiffs to proceed here under the jurisdiction in rem, instead of pursuing elsewhere remedies against individuals.

The first matter for decision upon the facts is that of the extent of the estoppel which the bill of lading in question would create in favour of a holder for value not affected with notice of the circumstances under which it was issued. Counsel for the plaintiffs relied to some extent upon the combined effect of the positive statement "shipped in good order and condition" and the negative statement "weight quality and condition unknown," and suggested a liability on the part of the defendants by reason of the knowledge their agents in fact had of the weight of the cargo shipped, and the state of the potatoes at shipment. To estop the defendants from denying that they knew the facts will not avail, however, to entitle the plaintiffs to judgment in

1921

THE TROMP.

The President.

an action where the quantity of the goods shipped, and their order and condition at shipment are the first things to be proved. The defendants are not sued for a false pretence of their agents that they did not know anything to the contrary of the statements in the bill of lading. What the plaintiffs need is to estop the defendants from denying that the quantity of potatoes shipped was 2923 bags, and that the 2923 bags were shipped in good order. The bill of lading is to be examined to ascertain whether it makes in plain terms these statements of fact. In my opinion it does. The words "weight and measure unknown" do not qualify the acknowledgment that there were shipped 2923 bags. The words "quality, condition unknown" do not cover the whole area of the representation made by the words "shipped in good order and condition." The representation made by the bill of lading, including the qualifying words, is that 2923 bags of potatoes were shipped in good order, and that the weight, quality, condition and measure of the goods were unknown.

In *Compania Naviera Vasconzada* v. *Churchill & Sim* (1) Channell J. distinguished the meanings of "condition" and "quality" as those terms are applied to goods, and defined "condition" as referring usually to external appearance. The goods there under consideration consisted of sawn timber. "In good order" and "in good condition" may perhaps have the same meaning when they relate to deals or planks, because the external state of the goods is there apparent. All that appears to the eye upon a shipment of potatoes in bags is the state of the packages. The good order of the shipment and the condition and quality of the goods are, or at any rate may be, separate matters. The defendants, while they guarded themselves by the qualifying words in the bill of lading from making any representation as to the condition and quality of the potatoes shipped on the *Tromp*, made a representation as to the state of the bags. Bags of potatoes in good order are not externally wet. The defendants are estopped from denying that the bags here in

(1) [1906] 1 K. B. 237.

question were dry when shipped. The wetness of the bags which was the main, if not the only, cause of the rotting of the potatoes in the ship's hold must therefore be attributed to the treatment of the cargo by the defendants' servants after the shipment. As between the defendants and an indorsee of the bill of lading without notice this would give the cause of action relied on by the plaintiffs.

The answer made by the defendants to the plaintiffs' claim —assuming an adverse decision as to the meaning of the bill of lading—is that the plaintiffs are not in truth indorsees, or indorsees without notice, that they were themselves the charterers of the vessel and the shippers of the cargo, and that they, by their agents, not only knew the state of the potatoes, but knowingly stowed them in wet bags, and agreed to be responsible for any damage which might be thereby caused. The plaintiffs no doubt ratified the action of Appelgren in chartering the *Tromp*. They used Appelgren as their agent, for a variety of purposes, in their efforts to secure careful shipment and careful handling of the goods. I do not find, however, that he bought or shipped the potatoes as their agent. They supposed him to be the seller's agent, paid by a commission for his services in selling goods which they bought f.o.b. at Gothenburg. Shipment was not undertaken by Appelgren on their behalf.

With regard to stowage, the terms of the charterparty and the statements of Appelgren were relied upon by the defendants. Clause 4 of the charterparty is in these words: "Vessel to load under inspection as to stowage by the authorised inspector appointed by shippers free of charge to vessel for such inspection. Stevedore employed by captain to be approved by shippers." The plaintiffs did not in fact appoint or request Appelgren to exercise any authority for them under the charterparty. They did not represent him, or, as the phrase is, hold him out as a person who might act for them in this respect. I accept the evidence which shows him to have said to the master and crew of the *Tromp* that he was the plaintiffs' agent, but I am satisfied that the defendants' master and their agents at Gothenburg did not believe

1921

THE TROMP.

The President.

that Appelgren was authorized on behalf of the plaintiffs to ship or sanction the shipment on board the *Tromp* of potatoes in wet bags. The plaintiffs in my judgment are not deprived of any rights they may otherwise have under the bill of lading by any acts done by Appelgren as an agent or pretended agent of theirs.

There remains the question whether the plaintiffs were themselves the shippers of the cargo. The plaintiffs agreed to buy a cargo f.o.b. and to pay against bills of lading and receipted invoice. The defendants by their agents knew the truth of the matter, and that the plaintiffs were not the shippers. This was one of the reasons of their decision to give the bills of lading which were given, only upon receiving a guarantee from the Baltic Agency to protect them from liability for consequences of this improper act. With very full knowledge in relation to the nature of Appelgren's dealings with the plaintiffs' interests, the defendants by their agents corroborated by their bill of lading Appelgren's representation to the plaintiffs that the Baltic Agency was the shipper of the cargo. The plaintiffs did not know, and the defendants ought not, as against them, to be heard to say that the fact was otherwise.

On the whole I come to the conclusion that within the narrow ground of claim to which the plaintiffs are necessarily limited in this action, they are entitled to judgment, and there must be a reference to the registrar and merchants to assess damages.

Solicitors for the plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitor for the defendants: *A. W. J. Groos.*

E. C. M. T.

ADMIRALTY.

1920
Dec. 6, 7.
1921
May 10, 11;
June 13.

THE JAMES W. ELWELL.

Admiralty—Seizure of Ship by Sheriff under Writ of fi. fa.—Judgment Debtors not Owners of whole Ship—Arrest by Admiralty Marshal in Actions in rem—Maritime Liens—Necessaries Claims—Insufficient Proceeds—Priorities—Bottomry Bond—Requisites for valid Contract of Bottomry.

A foreign ship was seized under a sheriff's writ of fi. fa. in execution of a judgment obtained by the charterers of the ship against the owners of 56/64th shares in the ship. Subsequently the ship was arrested by the Admiralty marshal in an action in rem for necessaries. Various other writs in rem were issued against the ship, including a writ by the master in respect of wages. The sheriff was unable to effect a sale, and the ship was sold by the marshal without prejudice to the rights of the various claimants:—

Held, (i.) That the sheriff was entitled to seize the ship as a whole, although he could only have sold the 56/64th shares belonging to the judgment debtors;

(ii.) That the fact that the sheriff was in possession did not deprive the marshal of his power to arrest the ship in actions in rem;

(iii.) That as the ship, at the time of her seizure by the sheriff, was encumbered with the master's maritime lien for wages, the claim of the master had priority to the claim of the execution creditors;

(iv.) That, except as regards 8/64ths, the execution creditors had priority over the necessaries men, who merely had rights in rem and were not secured creditors until they arrested the res;

(v.) That as between the necessaries men, inter se, they shared pari passu regardless of the dates of the arrests and judgments.

Advances were made on the terms of the following document relied on as a bottomry bond:—

"Sept 30, 1919. Bond of Bottomry between A. C. Clark, master of American schooner *James W. Elwell* . . . . and American Express Co. . . . . I, A. C. Clark . . . . do hereby agree to bond and lien said schooner together with her furniture, sails, gear and future earnings to the amount of frcs. 20,000 for value received, said American Express Co. to have absolute lien upon vessel until said loan is repaid together with interest accrued and all other charges relating thereto. . . . ." Signed, etc.

Held, that as neither the voyage on which the maritime risk was to be run, nor the time when the loan was to become repayable, was stated, the bond was not a valid contract of bottomry and gave the lenders no maritime lien.

Motions for judgment and for payment out of a fund in Court representing the proceeds of sale of the American sailing ship, *James W. Elwell*.

These motions raised the question as to the priorities inter se

1920

THE JAMES W. ELWELL.

of judgment creditors under a sheriff's writ of fi. fa., persons having maritime liens, and necessaries men under arrests by the Admiralty marshal in actions in rem; and also the question as to the validity of a document alleged to be a bottomry bond.

The parties before the Court were :—

(i.) Captain Reid, the master of the *James W. Elwell*, who had recovered judgment for 1080*l.* 19*s.* in respect of wages and subsistence money.

(ii.) The Svenska Stenkols A/B Carl Schlyter of Stockholm (hereinafter referred to as the Svenska Co.), execution creditors under a judgment obtained in the King's Bench Division for 7512*l.* 2*s.*, damages for breach of charterparty.

(iii.) The American Union Line (Inc.) of New York for 4000*l.* alleged to have been advanced in respect of wages and necessaries supplied to the ship. This claim was ultimately abandoned.

(iv.) McLeod & Hill, Ld., shipbrokers of London, for 1350*l.* alleged to have been advanced for necessaries, wages and repairs to the ship.

(v.) Alfred Brunt, proprietor of the Sailors' Home, Swansea, for 188*l.* 4*s.* in respect of the maintenance of the crew of the ship.

(vi.) P. Samuel & Co., ship's agents of Cardiff, for 1762*l.* 8*s.* balance of necessaries supplied to the ship.

(vii.) The American Express Co. for judgment on a document alleged to be a bottomry bond for 20,000 francs.

The owners of the *J. W. Elwell* were not represented. At the date when the sheriff levied execution in the Svenska Co.'s action the owners were the Northland Navigation Co., owners of 56/64ths, and one W. G. Morey, owner of 8/64ths. The Svenska Co.'s judgment was against the Northland Navigation Co. and not against Morey. The facts are sufficiently set out in the judgments.

On December 6, 1920, the master's motion to confirm the

report of the district registrar and for payment out was heard. The arguments on this part of the case sufficiently appear from the judgment.

E. A. Digby for the master.

Clement Davies for the Svenska Co.

Beyfus for the American Union Line (Inc.) and McLeod & Hill.

Dec. 7. HILL J. This is an application by Mr. W. D. Reid as master of the *James W. Elwell*, an American ship, for confirmation of the district registrar's report and for payment to the applicant of the amount found due on the report and costs out of the fund in Court realized by the marshal on the sale of the ship. The district registrar found the sum of 1080*l.* 19*s.* to be due to the plaintiff as master, and reports also that the plaintiff is entitled to the costs of the reference. The plaintiff had already obtained, in default, judgment of this Court that he was entitled to wages, the amount to be ascertained by the registrar, all questions of priorities being reserved.

It is now contended by Mr. Davies, who appears for some execution creditors, that they are at this stage entitled to object to the report on the suggestion that the plaintiff had not been properly appointed master or was not master for the whole period covered by the report. In my opinion that point is not open to them. They never intervened in the action and they cannot now be heard in objection to the report.

There remains the question whether I should order payment to the master, out of the fund in Court, of the amount now due to him under the confirmed report which becomes a judgment in his favour. There are a number of claimants who have obtained judgments in rem against the ship and who have had notice of the plaintiff's present motion, and some of them have appeared before me. No opposition is offered by any of the claimants to the plaintiff's request that the amount due to him shall be paid out of the fund. Those

1920

THE JAMES W. ELWELL.

HILL J.

who appear offer no opposition; those who have not chosen to appear can of course offer no opposition. It is obvious from what has been stated as to the nature of these claims that the plaintiff's claim, as master, for wages and subsistence money, ranks in priority to any of these other claims in rem against the ship.

Opposition, however, is offered by judgment creditors, who say that they are entitled to priority to all claimants who have obtained judgment in rem, including the plaintiff, whose right was supported by a maritime lien, by reason of the fact that they had procured a writ of fi. fa. to be issued and the sheriff to take possession under the writ of fi. fa. before any arrest of the marshal in any proceedings in rem. For the master it was contended that whatever the facts as to the personal judgment and the execution, they could not affect the master's lien. I am of opinion that the execution is no answer to the master's claim and does not deprive him of the priority which his maritime lien gives him.

The judgment creditors who object are a Scandinavian firm, the Svenska Stenkols A/B Carl Schlyter. In an action against Eleazer W. Clark, the Northland Navigation Co. and A. C. Clark, they, on July 28, 1920, obtained an order for judgment for 7512*l.* damages, the damages attaching only as against "the owners of the *James W. Elwell*," and judgment was drawn up accordingly "against the said defendants, the owners of the *James W. Elwell.*" That appears in the order made in the Commercial Court. In the statement of claim it was alleged that Eleazer W. Clark was the owner. It was stated before me on behalf of Messrs. McLeod & Hill that Eleazer W. Clark was not the owner at all, that the Northland Navigation Co. were part owners only, and that there was another part owner, Morey, who was not a party to the King's Bench action at all. That is disputed by the judgment creditors and will have to be determined when the facts are ascertained. I need not deal with that matter now.

What is important with regard to the claim of the master is that the judgment having been drawn up "against the

said defendants, the owners of the *James W. Elwell*," a fi. fa. was issued on August 5 and on August 6 the sheriff took possession of the ship. Later on the same day, August 6, in an action in rem instituted by the American Union Line (Inc.), a request to arrest was lodged with the marshal and the marshal by his agents at Swansea arrested the ship. Subsequently various other writs in rem were issued against the ship and caveats were entered in the registry. Among them were Mr. Reid's writ, which was issued on August 7, and a writ of Messrs. McLeod & Hill, who sued for necessaries, including advances made by them for payment of the crew's wages. On August 26 the sheriff put the ship up for sale and, not unnaturally in view of the circumstances, failed to obtain any bids. As long as there were outstanding against the ship either maritime liens or proceedings in rem, which alleged maritime liens, it would be a highly speculative purchase on the part of anybody who bought from the sheriff. On September 7 Messrs. McLeod & Hill applied to the vacation judge for an order for sale in their action in rem. That was opposed by the execution creditors. After an adjournment to enable notice to be given to all parties interested and after a second fruitless attempt to sell by the sheriff, the vacation judge on September 22 made an order for sale by the marshal. It was an ordinary order that the marshal " do appraise and sell and pay the proceeds into Court without prejudice to the rights of the plaintiffs in the actions instituted in the Admiralty Division and without prejudice to and reserving all the rights of the judgment creditors in the action in the King's Bench Division." The marshal accordingly sold the ship, which realized a little over 5000*l.* This sum will not be nearly enough to pay all the claims in full, and if the execution creditors were right as to their priority they would take the whole amount. Of course the marshal selling in this Court was able to give a title free of all liens, and therefore he could obtain a purchaser where the sheriff failed.

The judgment creditors' answer to the master is that the fund in the hands of the marshal represents the ship, and

1920

THE JAMES W. ELWELL.

Hill J.

that they, by the sheriff, were in possession of the ship and therefore are entitled to the fund without regard to any other claims against the ship. This contention, in my view, ignores the fact that the judgment creditors could only take in execution that which belonged to their judgment debtor and nothing else. The ship at the time the sheriff seized her was saddled with the master's maritime lien, and the judgment creditors could only take the ship subject to the lien. I have not been referred to any reported case to the effect that a ship or a share in a ship, which is subject to a maritime lien, remains subject to the maritime lien in the hands of the sheriff who has taken it in execution. In *Kitchen* v. *Irvine* (1), however, it was decided that a ship which is subject to a mortgage cannot be taken in execution under a fi. fa. by a judgment creditor of the mortgagor, and a maritime lien is a right of a much higher order than a mortgage. The matter, moreover, is covered by the provisions of s. 26, sub-s. 1, of the Sale of Goods Act, 1893, which deals with the effect of writs of execution. It runs: "A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same. Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."

The title of the master, at any rate up to the date of the execution, had been acquired before there was any execution in existence. I have no doubt at all that the master's wages which accrued before the date of the execution,

(1) (1858) 28 L. J. (Q. B.) 46.

rank in priority to any claim of the execution creditor. My only doubt has been as to allowances which are included in the report in respect of the periods between the master's writ of August 7 and the sale of the vessel by the marshal. They represent about a third of the whole of the master's claim. But I have come to the conclusion that these sums fall with the wages and rank before the execution creditors' claim. Whether the contract of the master comes to an end or not upon his arrest of the ship I think it is a rule of law acted upon in this Court, that the master's right to wages ceases at the date of his writ. But it has been the invariable practice of this Court so long as the master remains in charge of the ship (that is, until he has been discharged or the ship has been sold by the marshal) to allow him wages and subsistence money on the basis of his previous emoluments and to add them to his claim for wages under the head of costs. However they are described he is entitled to have added to his wages and to have covered by his maritime lien his wages and subsistence money up to the time when in fact his employment as master is determined. One is quite familiar with cases where there is competition between master and crew, suing for their wages, and necessaries men suing under their rights in rem, and in which the continuing wages of the master and crew are added to their claim and added to their maritime lien to the prejudice of the necessaries men who have already arrested the ship under their right in rem. I can see no reason for making any differentiation in favour of the execution creditors. If the execution creditors had wanted to get rid of the continuing wages of the master they could, just as mortgagees or necessaries men could, have obtained the consent of the Court to their paying off the master and standing in his shoes with the benefit of his maritime lien. In order that there may be no doubt about it I may say that such part of the master's claim as is for subsistence money stands exactly on the same footing as wages and is only wages expressed in another way. The result is that in my view, assuming that this execution is good and assuming that the whole of the ship belongs to

1920

THE JAMES W. ELWELL.

HILL J.

the judgment debtors—assuming all this in favour of the judgment creditors, I hold that the master in respect of his claim, which is now turned into a judgment upon confirmation of the report, is entitled to priority over the judgment creditors, and I therefore order payment out to him of the money so found, together with the costs of this motion.

All other questions as between the judgment creditors and other claimants I reserve, as they depend upon facts which have not yet been fully ascertained.

May 10. *Alfred Bucknill* for the American Express Co. The document relied on is a valid bottomry bond. (1) There is no settled form for a bottomry bond, and the fact that the maritime risk is not expressly stated is immaterial. It is not necessary that the peril of the voyage "shall be declared expressly, and in terms . . . . it is sufficient that the fact can be collected from the language of the instrument considered in all its parts": *Simonds* v. *Hodgson*. (2) "The very term 'bottomry' implies sea risk": *The Royal Arch*. (3) There is no reported case of a bond in which the word "bottomry" has been used being held invalid except cases in which it appeared that the money advanced was to be repaid "ship lost or not lost": e.g., *The Atlas*. (4)

[HILL J. Can there be a good bond of bottomry which does not define the voyage at all?]

All the circumstances point to the fact that the vessel was about to sail on the voyage which was known to the parties—namely, Bordeaux to Barry—and it should be implied that the bond was payable on the completion of the voyage then in contemplation. The voyage need not in fact be to the port of discharge, it can be to any place at which the voyage may terminate: *The Haabet*. (5) [Reference was also made to *Stainbank* v. *Fenning* (6); *The Karnak* (7); and *The*

(1) The document is set out in full in the judgment, post, p. 364.
(2) (1832) 3 B. & Ad. 50, 57.
(3) (1857) Swa. 269, 281.
(4) (1827) 2 Hagg. Adm. 48, 58.
(5) [1899] P. 295.
(6) (1851) 11 C. B. 51, 88.
(7) (1868) L. R. 2 A. & E. 289.

1921

THE JAMES W. ELWELL.

Cecilie. (1)] If the bond is invalid the claimants ask for leave to issue a writ for the amount due as necessaries.

Raeburn K.C. and *Clement Davies* for the Svenska Co., the execution creditors, interveners in the suit of the American Express Co. It is not enough that one of the parties has chosen to call the document a bottomry bond, if it in fact is not a contract of bottomry: see *The Atlas* (2), where the document was described as a respondentia bond. The Court looks at the terms of the document and not merely at its title, and must construe it by its tenor alone: *The Emancipation.* (3) In all the reported cases, with one exception, a voyage is described in the bond; otherwise no date could be inferred for repayment. The exact voyage was not described in *The Jane* (4), which was a hired transport, and therefore it was impossible for the master to describe the voyage with precision as he was subject to Government orders; but even in that case Sir W. Scott said "the master must describe the voyage as near as he can." In the present case there is nothing on the face of the document to show when payment is to be made. No maritime risk is expressed, and this is essential: *The Indomitable* (5); there was no obligation on the ship to proceed on her voyage at all; and the port of Barry, where it is alleged payment became due, is not mentioned. [*The Augusta* (6) and *Stainbank* v. *Shepard* (7) were also referred to.] If the bond should be held to be a good contract of bottomry there has been so much delay in the proceedings to enforce it that the rights of the American Express Co. should be held to be lost or at least postponed to those of claimants who have been more diligent.

As regards the question of priorities, the Svenska Co. are entitled to payment out of the fund in Court in priority to all the necessaries claimants. The sheriff had seized the ship in execution of the Svenska Co.'s judgment before the

(1) (1879) 4 P. D. 210.
(2) 2 Hagg. 48.
(3) (1840) 1 W. Rob. 124.
(4) (1814) 1 Dods. 461.
(5) (1859) Swa. 446.
(6) (1813) 1 Dods. 283.
(7) (1853) 13 C. B. 418.

1921

THE JAMES W. ELWELL.

necessaries men arrested her and purported to put the marshal in possession. No other officer of the Court can oust the possession of the first officer, and the marshal, therefore, was not entitled to arrest: see *The Bloomer* (1) and Williams & Bruce's Admiralty Practice, 3rd ed., p. 264, and cf. *The Flora.* (2)

[HILL J. If the marshal cannot arrest it would have most far-reaching consequences; but it is only necessary for you to argue that the marshal can only arrest subject to the position as he finds it.]

The first execution creditor is in the position of a secured creditor: *In re Clarke.* (3)

[HILL J. referred to *The Fairfield.* (4)]

It was arranged that the marshal should sell the ship without prejudice to the rights of the parties, but the sheriff was entitled to sell the whole ship, as he apparently had the authority of Mr. Morey to sell his 8/64ths shares.

[HILL J. There was no judgment against Morey, he was not a party to the proceedings, how could he authorize the sheriff to sell?]

The seizure was certainly good as regards the shares of the judgment debtors: cf. *Harvey* v. *Pocock* (5), and the sheriff could at least have sold those shares: *Harley* v. *Harley.* (6)

Beyfus for McLeod & Hill, Ld. The sheriff purported to seize the whole ship; 8/64ths of the ship were not the property of the debtors, and the execution therefore was wrongful. The sheriff had no right to go on board at all and was a trespasser; or, if he had a right to go on board in respect of the 56/64ths, the fact that he tried to sell the whole 64/64ths shows that he did not go on board merely in respect of the 56/64ths. The only legal method of seizing a ship owned in shares is to seize the shares: *Harley* v. *Harley.* (7) Part owners of a ship are not partners but tenants in common. A

(1) (1864) 11 L. T. (N. S.) 46.
(2) (1824) 1 Hagg. Adm. 298.
(3) [1898] 1 Ch. 336.
(4) (1678) Marsden's Adm. Cas. 252.
(5) (1843) 11 M. & W. 740.
(6) (1860) 11 Ir. Ch. Rep. 451.
(7) Ibid. 451, 463.

1921

THE JAMES W. ELWELL.

ship is not a chattel which passes by delivery and therefore does not vest in the sheriff by the act of seizure : see *Playfair* v. *Musgrove*. (1) Where a ship has been mortgaged for a debt, the sheriff cannot take and sell the ship at the suit of another judgment creditor : *Kitchen* v. *Irvine* (2) ; and the same principle should apply in the case of necessaries men. *The Bloomer* (3) is not an authority for the proposition that once the sheriff is in possession, possibly for a small debt, maritime lien holders and necessaries men with rights in rem cannot arrest and put the marshal in possession.

[It transpired during the hearing that McLeod & Hill's claim had been disallowed on the reference to assess damages, as they failed to prove that their advances were in respect of necessaries; but as to 200*l*. advanced for wages, all parties consented to the advance being treated as if the Court had authorized the payment and allowed the claimants to stand in the shoes of the crew.]

E. A. Digby for Alfred Brunt, and for the sheriff in respect of his costs, charges and expenses. From the date of the service of the writ in rem (August 10) Brunt became a secured creditor : *The Cella* (4) ; see also *The Pacific*. (5) The sheriff did not attempt to sell till August 26, and any purchaser would have bought subject to Brunt's necessaries claim, and the purchase price therefore would have been less by the amount of that claim, otherwise the necessaries man would in effect be deprived of the right in rem given him under the Admiralty Court Acts : see *The Princess Charlotte*. (6)

[HILL J. Has not the necessaries man translated the ship, already encumbered with the execution creditors' right, into his security ?]

No, because the sheriff's only right was to sell, and at that time the necessaries man was a secured creditor : cf. *The Aneroid* (7), where the writ was not issued until after a sale, and it was accordingly held that the necessaries man had no cause of action.

(1) (1845) 14 M. & W. 239, 245.
(2) 28 L. J. (Q. B.) 46.
(3) 11 L. T. (N. S.) 46.
(4) (1888) 13 P. D. 82.
(5) (1864) Br. & Lush. 243.
(6) (1864) 33 L. J. (Ad.) 188.
(7) (1877) 2 P. D. 189.

1921

THE JAMES W. ELWELL.

The sheriff is entitled to his charges and expenses out of the fund.

Brightman for P. Samuel & Co. adopted the same arguments as were put forward on behalf of McLeod & Hill and Alfred Brunt.

Clement Davies in reply.

Cur. adv. vult.

June 13. HILL J. read the following judgment. [After stating the facts set out in the previous judgment with regard to the seizure by the sheriff under the writ of fi. fa. in execution of the Svenska Co.'s judgment signed on August 4, 1920, and the arrest by the marshal in the suit in rem for necessaries brought by the American Union Line by writ issued on August 5, 1920, the learned judge continued as follows :] Other actions in rem were brought against the owners, and either the ship was arrested or caveats were entered in respect of the following claims :—

McLeod & Hill, Ld. ..	necessaries ..	writ issued	5.8.20
W. D. Reid, the master	wages ..	,, ,,	7.8.20
Alfred Brunt	necessaries ..	,, ,,	9.8.20
P. Samuel & Co. ..	,, ..	,, ,,	12.8.20

Since the sale, to be presently mentioned, a suit in bottomry has been brought by the American Express Co. by writ in rem issued on December 30, 1920. No appearances have been entered to any of these writs. [His Lordship then stated the facts with regard to the abortive attempts of the sheriff to sell and continued :] In the interval between the two attempts McLeod & Hill, Ld., moved for appraisement and sale. On September 21, 1920, an order was made in their action. This order directed an appraisement and sale by the marshal, without prejudice to priorities of the claimants in rem and reserving the rights of the judgment creditors. It condemned the ship and proceeds in the costs of the motion, in the costs of similar applications by the master (Reid), Mr. Brunt and Samuel & Co., and of the attendance of counsel for the sheriff and for the judgment creditors, the Svenska Co. The order was made with the consent of all those persons and, though

1921

THE JAMES W. ELWELL.

Hill J.

not so expressed in the order, of the American Union Line. The marshal sold. Together with the ship he sold a small quantity of cargo coal on board which has turned out to be the property of the Svenska Co. To the proceeds of that coal less a proper proportion of the marshal's expenses of sale, no one has any right except the Svenska Co. The fund resulting from the sale of the ship is not enough to pay all the claimants to it. It has therefore to be determined which of the claimants are entitled to claim against the fund and to determine the priorities.

I will first consider who has a claim enforceable by action in rem. The American Union Line obtained a judgment in default, but recognizing that they could not establish that their advances were for necessaries did not proceed to a reference. They have no right in rem. McLeod & Hill, Ld., obtained a judgment in default, but upon a reference it was found that their advances were not for necessaries. They have no right in rem. Their advances included a sum of 200*l.* advanced for payment of wages. They made that advance in the erroneous belief that they would stand in the shoes of the crew. The payment of course cleared away a maritime lien. Very properly all parties have assented to McLeod & Hill being treated as if they had paid the 200*l.* with the sanction of the Court. The master has established his claim, which of course carries a maritime lien and a right in rem. Mr. Brunt and Samuel & Co. have established their claims for necessaries. They have rights in rem. There remains the claim of the American Express Co. in bottomry.

The first question is whether the American Express Co. have a good claim in bottomry against the proceeds of the ship in Court.

The facts important for the present purpose are as follows. The ship was at Bordeaux under arrest in September, 1919, in claims for necessaries. The plaintiffs, the American Express Co., had made considerable advances to the owners to clear the arrests. They made a further advance on the terms of the document which they rely on as a bottomry bond. The ship was about to make a voyage from Bordeaux

1921

THE JAMES W. ELWELL.

HILL J.

to Barry with props and was under a charterparty to the Svenska Co. for coal from Swansea to Stockholm. The voyage from Bordeaux to Barry was performed, and the ship arrived at Barry on October 11, 1919. From Barry the ship went to Swansea and began to load under the charterparty. Her owners then refused to perform the charterparty. The Svenska Co. issued a writ and obtained an injunction, with the result that the ship lay at Swansea until the sale by the marshal. The Svenska Co. have intervened in the bottomry action and say that the alleged bottomry bond is not a bottomry bond at all, and that therefore the American Express Co. have no maritime lien.

As to the bond: (1.) The original has been lost, but I accept the copy produced as a true copy. (2.) The necessity of the loan was not disputed upon the evidence produced by the American Express Co. The ship was tied up by the arrests and could not move until they were cleared and the master had the actual authority of the owners. (3.) It is clear that the intention of the parties was that the advance up to fcs. 20,000 should be on terms of bottomry. (4.) The question is whether they succeeded in creating a valid contract of bottomry.

The document is as follows:—

"BORDEAUX (Gironde), FRANCE.

"September thirtieth, Nineteen hundred and nineteen. Bond of Bottomry between A. C. CLARK, Master of American Schooner *James W. Elwell* of Portland, Maine, and AMERICAN EXPRESS COMPANY, Three Cours de Gourgue, Bordeaux:—

"I, A. C. CLARK, Master of Schooner *James W. Elwell*, do hereby agree to bond and lien said Schooner together with her furniture, sails, gear and future earnings to the amount of francs 20,000 (twenty thousand) for value received, said American Express Company to have absolute lien upon vessel until said loan is repaid together with interest accrued and all other charges relating thereto.

"I further state that said vessel was built at Bath, Maine, U.S.A." [Here followed description and dimensions.]

1921

THE JAMES W ELWELL.

HILL J

"This vessel at this date first above written, is valued at about one hundred and fifty thousand dollars, and there are no previous attachments against her, to the best of my knowledge and belief, and I further agree not to draw any further bond on said ship without first having consent from the AMERICAN EXPRESS COMPANY.

(Signed) A. C. CLARK.

WITNESSED by JAMES D. CHILDS.

Subscribed and sworn to before me this 30th day of September, 1919. JOHN A. SCOTT, Vice-Consul of the U.S.A. at Bordeaux."

Is this an effective bottomry bond? Whether it is or is not must be gathered from the document itself: *The Emancipation* (1); and cf. *The Indomitable* (2); "there must be a maritime risk in the instrument; it matters not in what form of words." See also *Simonds* v. *Hodgson.* (3) "No person can be entitled to it (maritime interest) who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly, and in terms, though this is often done; it is sufficient that the fact can be collected from the language of the instrument considered in all its parts." It is said that such bonds should receive a liberal interpretation. Be it so, but the document, given a liberal interpretation, must be one which shows the essentials of a bottomry contract. One of those essentials is often spoken of as a maritime risk. This means that the payment of the money advanced is conditional upon the safe arrival of the ship: cf. *The Emancipation.* (1) That is the meaning of the necessity of sea risk: cf. *Stainbank* v. *Shepard.* (4): "It is essential to the validity of hypothecation that the sea risk should be incurred by the lender, and that the pledge on the ship should take effect only in the event of its safe arrival." It is said that the use of the word "bottomry" shows that the lender was lending on terms of some maritime risk. It

(1) 1 W. Rob. 124, 128, 130.
(2) Swa. 446, 452.
(3) 3 B. & Ad. 50, 57.
(4) 22 L. J. (Ex.) 341, 346; 13 C. B. 418, 442.

1921

THE JAMES W. ELWELL.

Hill J.

may be so: see *The Royal Arch* (1), where Dr. Lushington says "the very term 'bottomry' implies sea risk," and cf. his observations in *The Emancipation* (2): "Hypothecation may mean bottomry or mortgage only, and if you have a voyage described and the contract is expressed to be one of bottomry, there is little difficulty in inferring that the condition of repayment is safe arrival on that voyage." But what can be inferred from the word "bottomry" detached from any voyage or anything to denote when the risk is to begin and when to end? To have a good contract of bottomry you must have a loan with repayment conditional upon safe arrival—i.e., you must have a voyage the sea risk of which is to be run by the lender. Lord Stowell in *The Atlas* (3) said: "The definition of bottomry bonds which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, pars pro toto, as a security for repayment. It is moreover stipulated, that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money." No single case has been cited in which there was not a voyage specified in the bond except one exception which proves the rule—namely, *The Jane* (4): "He must describe the voyage as near as he can." If no voyage at all is specified, there is nothing to prevent the loan being immediately repayable or to make repayment conditional upon the ship surviving any particular risk. Or, on the other hand, there is nothing to prevent the lender indefinitely postponing a demand for repayment and leaving the ship for years subject to a secret maritime lien. It is said for the plaintiffs that this bond became payable on arrival at Barry. The bond does not say so. Nor can anything of the sort be implied from its terms. The bond is a contract whereby, in consideration of an advance, the plaintiffs are given an

(1) Swa. 269, 281.
(2) 1 W. Rob. 124, 128, 130.
(3) 2 Hagg. Adm. 48, 53.
(4) 1 Dods. 461, 463.

absolute lien on the ship and her future earnings. As no time is fixed for payment, the loan is repayable on demand. I see nothing in this document to prevent the plaintiffs demanding repayment before the ship left Bordeaux. On the other hand, I see nothing to prevent them letting the loan run on indefinitely and maintaining the secret maritime lien on the ship all the time. Called a bond of bottomry, it is really only an attempt to create a lien to secure a loan, and it is not even a mortgage. I hold it void. It is therefore unnecessary to decide the question whether the plaintiffs were not so slow in asserting their rights that they ought to be postponed to the other claimants.

The plaintiffs asked leave to amend and to claim as necessaries men. At this late stage I ought not to give leave. It would do them no good if I did, for they never advanced on the personal credit of the owners, and unless they have a personal claim in debt against the owners for necessaries they can have no right in rem.

The priority of the master being recognized by all, he has already been paid out of the fund. As to the balance, less such costs and charges as are properly chargeable against it, the competition is between the Svenska Co., as execution creditors, on the one hand, and Mr. Brunt and Samuel & Co. on the other. As between themselves Brunt and Samuel & Co. rank pari passu. This issue raises several questions. First, when a sheriff has seized under a fi. fa. before the marshal arrests in an action in rem to enforce a claim not supported by a maritime lien—e.g., a claim for necessaries—does the execution creditor rank before or after or pari passu with the arresting plaintiffs ? In the present case the question is complicated by the further question whether the judgment debtors were owners of the whole of the ship or only of 56/64th shares, and the resulting question as to the powers of the sheriff to seize shares in a ship and the method in which such seizure can be effected.

The defendants in the action brought by the Svenska Co. were Eleazer W. Clark, the Northland Navigation Co. and A. W. Clark. A. W. Clark was the master at the date of

1921

THE JAMES W. ELWELL.

Hill J.

the Svenska Co.'s writ, and was joined only for the purpose of an injunction. The judgment for damages, which the sheriff was executing, was against the owners only. Upon the affidavits now before the Court I find that in August, 1920, the ship was owned as to 56/64ths by the Northland Navigation Co., an American corporation, and as to 8/64ths by Walter G. Morey. The execution creditors had no judgment against Morey, and the sheriff had no power to sell Morey's shares. It is true that Messrs. Cooper & Co., solicitors for the defendants in the Svenska action, consented to the sheriff selling the whole ship, but that consent could not prejudice the rights of those who were suing in rem and who were entitled to enforce their rights against all the owners, including Morey. It follows that Brunt and Samuel & Co. are alone entitled to so much of the fund as represents 8/64ths of the ship. As to the remaining 56/64ths the question remains as between the execution creditors and the necessaries men.

There was much argument as to the method by which shares in a ship could be effectually seized under a fi. fa. Much of that argument was based on the assumption that the sheriff could only transfer the shares by bill of sale, and in that connection the Irish case of *Harley* v. *Harley* (1) was referred to. In my view, all this argument was irrelevant. The *James W. Elwell* was a foreign ship to which the Merchant Shipping Act, 1894, did not apply. I need express no opinion as to the authority of anything said in the Irish case. If the whole ship had belonged to the judgment debtors, the sheriff could have seized it and sold it like any other chattel. No statute would have required a transfer in any particular way: cf. *Union Bank of London* v. *Lenanton*. (2) The transfer would be governed by the common law. So with shares in a foreign ship, the sheriff can seize and sell and transfer as he can an undivided share in any other chattel. There is no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share. The co-owners of a ship are not, by reason of the

(1) 11 Ir. Ch. Rep. 451. (2) (1878) 3 C. P. D. 243.

1921

THE JAMES W. ELWELL.

Hill J.

co-ownership, partners in the property, though they may be partners in the employment of it. Sect. 23 of the Partnership Act, 1890, does not apply. The Merchant Shipping Act has nothing to say to the transfer of shares in a foreign ship. No other statute limits the common law right. The 56/64th shares were validly taken in execution by the sheriff by seizure of the ship, and the sheriff, if he had found a buyer, could have effectually transferred the shares. On the other hand I dissent altogether from the argument that, the sheriff being in possession of the ship, the marshal had no power to arrest. It would be strange indeed if the sheriff being in possession of a ship in execution of a judgment obtained against the owner of 1/64th share could prevent an arrest by the marshal in an action in rem against the owners of the whole 64/64th shares. Whatever difficulties may have arisen in former days out of the conflicting jurisdictions of the common law and Admiralty Courts, there are no such difficulties to-day. The sheriff and the marshal are alike the servants of the High Court of Justice. I see no more objection to the marshal and the sheriff both seizing a ship than I do in the sheriff seizing the same chattel twice over under two separate fi. fa.'s. If difficulties arise as to sale, they can be dealt with by the Court, as was done in the present case, and the Court will be careful to provide that the sale directed by it shall not prejudice any rights acquired by the several seizures or arrests. In my view the only question is one of priorities. The execution creditors validly seized through the sheriff. The necessaries men validly arrested through the marshal. The ship has been ordered to be sold without prejudice to priorities in rem and reserving the rights of the judgment creditors. Who has the priority ? In my opinion it is the execution creditors, the Svenska Co. From the moment of seizure by the sheriff, the execution creditor is in the position of a secured creditor in regard to the goods seized: see *Ex parte Williams* (1); *Slater* v. *Pinder* (2); and *In re Clarke*. (3) The execution creditor

(1) (1872) L. R. 7 Ch. 314. (2) (1872) L. R. 7 Ex. 95.
(3) [1898] 1 Ch. 336.

1921

THE JAMES W. ELWELL.

Hill J.

from the moment of seizure had a legal right as against the execution debtor—i.e., the owner of the goods—to have the goods sold and to be paid out of the proceeds of sale. At that moment the necessaries men had nothing but a right to sue the owners by writ in rem and by arresting the ship to make it a security for any judgment they might ultimately recover. As said by Lord Esher in *The Cella* (1) "the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant." But until the moment of the arrest, the necessaries man, having no maritime lien, is not in any sense a secured creditor. In my opinion, the arrest cannot deprive the execution creditor of his existing security. It was ingeniously argued by Mr. Digby for one of the necessaries men that the sheriff had not sold and could not in law have sold by the time the marshal arrested, and that the sheriff when the time for sale came could only have sold and transferred subject to the rights acquired by reason of the arrest effected before the date of sale. I cannot agree. If the argument were sound, then a later seizure under one fi. fa., before sale under an earlier seizure under another fi. fa., would prevent an effective sale under the first seizure and would have the effect of preferring a later to an earlier seizure; whereas the law gives priority to execution creditors in the order of the seizures, or to speak more strictly in the order of the delivery of the writs of fi. fa. to the sheriff. As between several necessaries men suing in rem this Court has worked out the equitable rule that all share pari passu, whatever the date of the arrests and judgments: *The Africano.* (2) But I cannot see my way to extend that equitable rule to the prejudice of an execution creditor for whom the sheriff has seized before the arrest by the marshal.

In the present case I regret having to come to this decision. There can be no doubt that the fund has been created by a sale by the marshal, and that it never could have been created by a sale by the sheriff. The necessaries men, or more strictly speaking McLeod & Hill, have pulled the chestnuts

(1) 13 P. D. 82, 87. (2) [1894] P. 141.

1921

THE JAMES W. ELWELL.

Hill J.

out of the fire for the Svenska Co. But in my opinion as to 56/64ths it was the Svenska Co.'s chestnut.

The result is as follows :—

The proceeds of sale of the coal less a proportion of the marshal's expenses of sale belong to the Svenska Co. The residûe of the fund will be applied as follows :—

1. The costs of the appraisement and sale and the costs of the marshal's possession ; i.e., if it has not already been done the marshal will deduct all his costs and charges.

2. The costs awarded by the order of September 21, 1920.

3. 200*l.* to McLeod & Hill.

4. As to the residue, 8/64ths to Mr. Brunt & Samuel & Co. sharing pari passu ; and 56/64ths to the Svenska Co. subject to deduction of the sheriff's charges, which will be paid to the sheriff.

The Svenska Co. will have their costs of intervention in the American Express Co.'s action (bottomry). No costs to any one on the motion as to priorities.

Solicitors for the master and for A. Brunt : *Ingledew, Davis, Saunder & Brown, for Ingledew, Sons & Crawford, Swansea.*

Solicitors for the sheriff : *Downing, Handcock & Co.*

Solicitors for the Svenska Co. : *Thos. Cooper & Co.*

Solicitor for McLeod & Hill and the American Union Line : *Ed. D. K. Busby.*

Solicitors for P. Samuel & Co. : *W. A. Crump & Son, for Gilbert Robertson, Cardiff.*

Solicitors for the American Express Co. : *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

1921
June 1, 14.

ADMIRALTY.

THE TARBERT.

Admiralty—Salvage—Property brought into comparative Safety—Absence of Benefit to salved Property—Life Salvage—Claim by engaged Tug.

While the plaintiffs' tug was attempting to tow a sinking ship ashore the ship struck on a bank and became a constructive total loss, but cargo of the value of over 17,000*l.* was got out of her as she lay on the bank. The plaintiffs claimed salvage. The evidence was that if the ship had been allowed to sink in deep water portions of the cargo could have been saved with approximately the same monetary result:—

Held, that, as the cargo where the salvors left it was not worth more than it would have been if the salvage service had not been performed, the plaintiffs were not entitled to any award.

Semble, a tug engaged to tow a vessel, in taking on board the crew of the vessel after a collision, is not so far acting outside the scope of her employment as to entitle the owners, master and crew of the tug to an award for life salvage.

ACTION OF SALVAGE.

The plaintiffs were the owners, master and crew of the steam tug *Knight Templar;* the defendants were the owners of the steamship *Tarbert*, her cargo and freight. In fact, however, the *Tarbert* was a constructive total loss and there was no freight recovered, but the salved cargo was of the value of 17,124*l.*

The *Knight Templar*, a screw tug of 146 gross tons register, manned by a crew of eleven hands, on December 22, 1919, was engaged to tow the *Tarbert* up the Mersey. The *Tarbert* was a screw steamship of 1696 tons gross register laden with a cargo of palm oil in casks and palm kernels in bags. The *Knight Templar* had the *Tarbert* in tow when a collision took place between the *Tarbert* and the steamship *Otterdal*. The *Tarbert* was struck amidships and received serious damage. The *Knight Templar* came alongside and took off the crew and was requested to tow the *Tarbert* inshore and beach her. The *Tarbert* was settling down in the water, but her master and two hands returned to her and made the *Knight Templar's* rope fast and the towage began. The

1921

THE TARBERT.

Tarbert, however, soon began to sink rapidly, the master and the two hands were taken off by another tug, and shortly afterwards the vessel took the ground on the Pluckington bank and sank.

The defendants pleaded that the services were without benefit to the *Tarbert*, her cargo or freight. The *Tarbert* became a total loss, and if she had not been taken in tow by the *Knight Templar* she would have sank in deep water and could have been raised and salved, together with the whole of her cargo, and at less cost than was involved in salving the cargo from the vessel as she lay on the bank.

Laing K.C. and *John B. Aspinall* for the plaintiffs. The foundation of salvage is that the res or part of it has been saved, and in this case, although the ship was a constructive total loss, cargo worth over 17,000*l.* has been saved to its owners. The plaintiffs' evidence was that if the ship had sunk in deep water the cargo could have been saved by diving operations. But the quantity saved and the cost of saving it must be a matter of speculation ; and the defendants have not established that the services conferred no benefit. Further, the services were rendered at request, and in that case the property need not be brought into greater comparative safety : *The Benlarig.* (1) In addition, although not entitled to a substantial sum, the plaintiffs are entitled to something in respect of life salvage. The *Tarbert* was sinking rapidly and the *Knight Templar* took off the crew. The service as a whole was a meritorious one, the plaintiffs received considerable damage in the performance of it, and are entitled to a substantial award.

Bateson K.C. and *Balloch* for the defendants. The request was a request to beach and the tug did not succeed in beaching. As an engaged tug the defendants were entitled to tell her to tow the ship inshore and beach her. Further, being an engaged tug, the plaintiffs are not entitled to an award, however trivial, in respect of the *Knight Templar's*

(1) (1888) 14 P. D. 3.

1921

THE TARBERT.

services for the alleged life salvage. It was the duty of the tug to take the crew off their sinking ship if required to do so. Although the cargo was saved it was not saved by the plaintiffs; and salvage is the reward for benefit conferred: see *The Zephyrus* (1); *The India* (2); *The Cheerful* (3); *Five Steel Barges* (4); and *The Hestia*. (5)

[HILL J. May it not be a benefit to the property and not to the owner?]

It is submitted that the service must be of benefit to the defendants; the plaintiffs must prove that they have conferred a benefit on property in which the defendants are interested: see *The Port Victor*. (6) The evidence given by the plaintiffs themselves establishes that the cargo-owners have derived no benefit from the services; the cargo could have been salved from deep water as easily and at less cost than was involved in getting it out from the *Tarbert* as she lay partially submerged on the bank.

HILL J. This is a case which raises a difficult problem and I have not arrived at a conclusion without some hesitation. The conclusion I have arrived at is that the plaintiffs have not established their right to salvage.

The plaintiffs are the owners of the tug *Knight Templar*, and the defendants are the owners of the steamship *Tarbert*, her cargo and freight. The *Tarbert* was laden with a cargo of palm oil in casks and palm kernels in bags. On the night of December 22, 1919, she was in the River Mersey about abreast of the Woodside stage and a little to the west of mid-river, heading to the south, and the *Knight Templar*, which had been engaged to assist her, was fast to her and had her in tow. In those circumstances the *Tarbert* was run into by the steamship *Otterdal* and received very severe damage. The tow rope parted or was cast off, and the *Tarbert* was left with whatever way she had on and the flood tide under her and with her helm hard-a-starboard. Upon that it is

(1) (1842) 1 W. Rob. 329.
(2) (1842) 1 W. Rob. 406.
(3) (1885) 11 P. D. 3.
(4) (1890) 15 P. D. 142.
(5) [1895] P. 193.
(6) [1901] P. 243, 247.

alleged in the statement of claim that the *Knight Templar* was requested by the master of the *Tarbert* to make fast and to attempt to tow the *Tarbert* inshore. The *Knight Templar* made fast. An attempt was made to get the *Tarbert* to the Liverpool side, but in crossing the outer part of the Pluckington bank the *Tarbert* struck the bottom, heeled over on her beam ends, and there lay. In that position the *Tarbert* became a constructive total loss, but part of her cargo, worth 17,124*l.*, was got out. On the bank where the *Tarbert* lay she was submerged at certain states of the tide and partially so at all tides. According to the evidence and the charts there would appear to have been at least sixteen feet of water at that place and perhaps rather more at high water on ordinary spring tides. If she had been left to herself instead of being taken hold of by the tug she would almost certainly have sunk in deeper water, and probably in considerably deeper water. That is a matter of speculation, because one has to speculate as to how long she would have kept afloat, how much headway she had, and what would be the effect of the tide. It is not, however, disputed that she would have sunk somewhere out in the river, instead of sinking on the Pluckington bank; but the evidence also is that if she had sunk in mid-river a large quantity of cargo could have been saved, and perhaps more than was saved from her in the result—perhaps at greater expense but with approximately the same net result in money. That was the evidence called for the plaintiffs, and it was the only evidence called, as the defendants were content to rest upon it. The conclusion, therefore, of that evidence is that when the cargo had been put on the Pluckington bank it was in a position from which it could be, or a portion of it could be, brought to shore, so as to give a net result of 17,000*l.* odd; but that if it had not been put on the Pluckington bank and the ship had sunk in deeper water, a portion of the cargo would equally have been saved, so as probably to give the same result.

It is for the plaintiffs to make out that they have rendered services which entitle them to a salvage award. The main

1921

THE TARBERT.

Hill J.

question, and I am not sure it is not the only question, is whether any actual benefit was conferred on the cargo by what the tug did. The question may be expressed in this form: Was the cargo when the tug left it worth more than it would have been if the tug had done nothing? The plaintiffs have failed to prove that it was worth more; on the contrary, they have given evidence to show it was worth no more. The property, regarded as a whole, was never brought into complete safety. The most that could have been said of it was that it was brought into comparative safety. On the bank it still had to be rescued from very grave peril, just as it would have been if it had been at the bottom of the river, and if each method of rescue would have given the same result, in my view the only conclusion is that the services of the tug did not make the cargo worth any more, and in fact did not put the cargo in a position of greater comparative safety. It might have been said that on the bank the completion of the saving of the cargo was a matter of certainty, whereas if the ship had sunk in the river, it was a mere matter of speculation; but the evidence given by the plaintiffs and accepted by the defendants puts that view out of Court.

It is said, however, that even if no benefit was conferred, the services were rendered at request and the res was ultimately saved, and therefore the services must be rewarded. But as I understand the rule as to the rewarding of services rendered at request it is that if a salvor is employed to do a thing and does it, and the property is ultimately saved, he may claim a salvage award, although the thing he does has produced no good result. But in this case, one has to look at what the tug was requested to do. She was requested to tow the ship inshore. That she did not do. She made a very praiseworthy effort to do it, but she did not do it, because owing to misfortune the ship struck on the Pluckington bank. I am therefore unable to say that the plaintiffs bring this case within the doctrine of payment for services rendered at request.

There remains only the question of life salvage, and I do

1921

THE TARBERT.

Hill J.

not think it is made out that this tug saved the lives of the master and crew. There was another tug in the vicinity which ultimately took off some of the crew. Moreover, I am not prepared to say that an engaged tug which takes on board the master and crew of the ship which has engaged her is so far acting outside her duty that she can claim as a salvor. For these reasons I think that the plaintiffs' claim fails.

I only wish to add that the plaintiffs have proved damage to their tug and her tackle to the amount of 206*l.*, and that if they had succeeded in getting the ship close in to shore they would have got a handsome award. It is one of those cases in which unfortunately they were not successful in carrying out a service which would have entitled them to a large award. The action must be dismissed with costs.

Solicitors for the plaintiffs: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the defendants: *Batesons & Co., Liverpool.*

E. C. M. T.

1921
June 28.

DIVORCE.

PALMER *v.* PALMER.

In the Matter of the Petition of THOMASSON.

Divorce—Practice—Restitution of conjugal Rights—Substituted Service of (1.) *Decree,* (2.) *Demand for Return to Cohabitation required by Divorce Rule* 175*—Service out of the Jurisdiction—Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 2*—Divorce Rules* 175, 221, 222.

In suits for restitution of conjugal rights, substituted service on the respondent of the decree may be ordered as well as of the petition and the demand for return to cohabitation. The Divorce Rules 221 and 222, as to service out of the jurisdiction, apply to substituted as well as personal service.

THESE were motions by wives, petitioners for restitution of conjugal rights, for service by some means other than personal service, in *Palmer* v. *Palmer* of the decree, in *In the Matter of the Petition of Thomasson* of the wife's demand for return to cohabitation, required to ground proceedings. In the second case leave was also asked for service out of the jurisdiction.

In the first case the petition was filed on August 6, 1920; the respondent had been duly served on September 3, but had not entered an appearance. On April 25, 1921, the usual order was made for restitution of conjugal rights within fourteen days. The respondent had been living with his parents at Gipsy Hill, Norwood, but had left that address, apparently to avoid service. His parents had refused to tell the petitioner where he was, but had practically admitted to her solicitor that they knew his address.

In the second case the parties were married in 1904; the respondent had left his wife and gone to Canada in 1907. But in 1914 he enlisted in the Canadian Forces, returned to England and cohabited with his wife till 1916. In 1917 he returned to Canada, but his wife received a separation allowance until early in 1920; since that date she had neither seen her husband nor received any letter or money from him.

1921

PALMER v. PALMER.

THOMASSON, *In the Matter of the Petition of.*

The husband had occasionally written to his mother, and it appeared that he had been moving about the Dominion of Canada without staying long in any place; the last address he wrote from was Esquimault, B.C.

G. C. Tyndale for the motion in *Palmer* v. *Palmer*. The principle acted on by the Ecclesiastical Courts in matters of service is laid down by Sir John Nicholl in *Durant* v. *Durant* (1), where he says: "The Court is always, or means to be, satisfied that there has been a personal service before issuing its compulsory process." That rule prevented the Courts allowing substituted service of a restitution decree so long as it could only be enforced by attachment. Since the Matrimonial Causes Act, 1884, s. 2, put an end to attachment for that purpose, the reason no longer applies, and substituted service of the petition has been allowed in *Macarthur* v. *Macarthur* (2) and *Hardie* v. *Hardie* (3); and of the demand for return to cohabitation required by r. 175, in *In re Sheehy* (4) and in *In re Tucker*. (5) There is no direct authority for substituted service of the decree, but in *Perrin* v. *Perrin* (6) Sir Samuel Evans P., when stating the new rules for service out of the jurisdiction of proceedings in suits for the restitution of conjugal rights, treats the service of petition, citation and decree as all standing on the same footing.

Albert Crew for the motion in *In re Thomasson*. In this case the motion is for substituted service of the statutory demand for return to cohabitation where the respondent is believed to be out of the jurisdiction. *In re Sheehy* (4) and *In re Tucker* (5) show that substituted service of the demand may be allowed when the respondent is within the jurisdiction. In *Waters* v. *Waters* (7), which was the case of a husband's petition, substituted service was allowed on a wife, who was out of the jurisdiction, by serving her solicitor

(1) (1822) 1 Add. 114, 122.
(2) (1889) 58 L. J. (P. & M.) 70.
(3) (1901) 70 L. J. (P. & M.) 29.
(4) (1876) 1 P. D. 423.
(5) [1897] P. 83.
(6) [1914] P. 135.
(7) (1876) 34 L. T. 33.

1921

PALMER v. PALMER.

THOMASSON, *In the Matter of the Petition of.*

within it. And I submit the Divorce Rules 221 and 222 apply to substituted as well as personal service out of the jurisdiction.

HORRIDGE J. (as to *Palmer* v. *Palmer*). I cannot find any direct authority for ordering substituted service of the decree in restitution cases. But there is authority for allowing such service of the petition and of the demand required by r. 175. It seems clear to me that if there is jurisdiction to allow substituted service in those cases, there must be jurisdiction to order it in the case of the decree. I am satisfied that in this case the respondent's parents know where he is, and I direct service by registered letter addressed to the respondent at his father's house and by advertisement in the *Crystal Palace Gazette*.

As to the second case, there is authority for allowing substituted service of the demand for return to cohabitation; and as the matrimonial home is proved to have been in England, the conditions required by rr. 221 and 222 for service out of the jurisdiction are satisfied. The demand may be served by advertisement in some paper circulating in Esquimault.

Solicitor in *Palmer* v. *Palmer*: *C. H. W. Mander.*
Solicitor in *In re Thomasson*: *W. H. House.*

J. R. B.

[IN THE ARCHES COURT OF CANTERBURY.] 1921

APPEAL FROM THE CONSISTORY COURT OF GLOUCESTER. *May* 30; *July* 22.

EARL BATHURST *v.* THE VICAR, CHURCHWARDENS AND PARISHIONERS OF CIRENCESTER.

Ecclesiastical Law—Faculty—Church Seats—Discretion of Court to decree Faculty for appropriating Church Seats.

Grants of faculty for appropriating church seats are now very seldom granted, but in a case where there had been continuous possession by the same family for upwards of two hundred years of seats in the gallery of the side chapel of a parish church and of substituted seats on the floor of the chapel erected at the expense of the family, and where also at the commencement of the continuous possession of the seats the Ordinary had recognized that the predecessors of the petitioner had special rights in the seats distinguished from the seats over which the Ordinary had jurisdiction, the Court of Arches decreed a faculty to issue appropriating the seats to the use of the petitioner and his successors and his and their families subject to the usual provision of residence in a named house in the parish.

Observations as to the rights of owners of faculty pews when a general reseating of the church takes place.

THIS was an appeal from the judgment of the Chancellor of the diocese of Gloucester (E. W. Hansell, Esq.) sitting in the Consistory Court of Gloucester.

By the judgment appealed against the Court below had refused to grant a faculty for the appropriation of certain church seats in the parish church of Cirencester.

The case is reported only on questions as to the discretion of the Ecclesiastical Court to decree in its discretion a faculty ex gratia for the appropriation of church seats. It is therefore considered unnecessary to further refer to the proceedings in the Court below; the question as to the grant of a faculty ex gratia having only been raised in the Court of Arches after a new citation and amended pleadings.

1921. May 30; July 22. On these days the appeal was heard before the Dean of the Arches (Sir Lewis Dibdin, D.C.L.).

Harold Hardy appeared for the appellant.

1921

BATHURST (EARL) v. CIRENCESTER PARISH.

No appearance was entered to either of the two citations issued in the appeal and no respondents appeared on the appeal.

THE DEAN OF THE ARCHES. The petition in this case, as presented and as dealt with by the learned Chancellor in the Consistory Court of Gloucester, asked for a faculty to confirm a substitution, made in 1852, of the seats in Cirencester Parish Church now occupied by Lord Bathurst, for the seats previously occupied by his predecessor in the title, and for which it was pleaded in the petition that a faculty existed. The confirmatory faculty thus sought was claimed as a matter of "proprietary right," and that was the only issue raised by the petition in its original form. The petitioner failed to produce or to prove the original faculty which was the basis of his claim, and the petition was dismissed in the Court below. Lord Bathurst appealed from that decision to this Court, and on the case coming on, his counsel, after some discussion, asked leave to amend the petition by asking in the alternative that, if Lord Bathurst's claim to a confirmatory faculty on the ground of proprietary right should be held to be not established, he should nevertheless be granted a faculty ex gratia for the seats in question, on the ground that under all the circumstances it is just and reasonable that such a faculty should be granted. Counsel also asked leave to put in further evidence and that I should retain the case in this Court. I agreed to this course being taken and directed a fresh citation to issue on the petition as amended. There has been no appearance to this fresh citation and the case now comes on in its new shape, on new evidence and without any opposition from the vicar, churchwardens, or parishioners of Cirencester. The Parochial Church Council has by resolution declared that it offers no opposition to the application.

The material facts as now before me can be shortly stated. Cirencester Church is a large and ancient church seating more than 1200 persons. On the north side of the north aisle Trinity Chapel is built out and forms an excrescence to the

general plan of the church. It was probably once the private aisle of the Abbots of Cirencester, who were Lords of the Manor. At the end of the seventeenth century an ancestor of the present Lord Bathurst acquired a mansion and estate at Cirencester and the Lordship of the Manor, and his family have been since that date important residents in the parish. The chapel contains many monuments and tablets in memory of members of the family, some of whom are buried in a vault under the chapel. It also contains pews which face south, that is across the north aisle and nave, and of these the three in the north-west corner of the chapel are the pews as to which Lord Bathurst seeks a faculty. An earl's coronet is painted on the bench end of each of these pews, and the pews are and have long been occupied by the Bathurst family.

Prior to 1853 there do not seem to have been seats on the floor of the chapel. In 1706 a gallery was built along the whole length of the chapel on the line dividing it from the north aisle of the church. This gallery was approached from the chapel by a staircase and provided a considerable number of seats facing south, that is across the north aisle and nave. It is extremely probable that this gallery was built at the expense of the then Lord Bathurst, and it is so stated on certain boards bearing painted inscriptions formerly in the church, and now in the Town Hall just outside, which definitely record the fact and bear the names of the church-wardens for the year 1771–2. The Lord Bathurst of 1706 was still alive in 1772. There is difficulty in accepting these boards as evidence in support of a private right, but it must be admitted that their story agrees with tradition and probability. In view of subsequent facts, it is not necessary to come to a formal decision on this point. No faculty is forthcoming to authorize the building of the gallery in 1706. But in 1718 a faculty was obtained to regulate the seating of the whole church, including this gallery. The plan attached to this faculty shows a square space in the gallery marked "Allen Lord Bathurst and servants." The rest of the church and gallery is divided into pew sites of the ordinary shape, which for the most part have numbers and prices to indicate

1921

BATHURST (EARL) v. CIRENCESTER PARISH.

The Dean of the Arches.

the rent proposed (quite illegally, be it observed) to be charged. The square space marked with Lord Bathurst's name is unnumbered and unpriced. In 1780 another faculty was obtained under which the seats in the church and gallery were renumbered and repriced according to an annexed plan, but the square space in the gallery remains unnumbered and unpriced and is marked "Earl Bathurst." In 1852, in pursuance of a resolution of the vestry for the removal of the gallery—in the resolution called the Bathurst Gallery—and for the reseating of the occupants of the gallery seats in seats to be erected on the floor of the chapel, at the expense of Lord Bathurst, a faculty was granted for these purposes. The plan attached to this faculty indicates the square space shown on the plans of 1718 and 1780 as still there, but it neither describes it as belonging to Lord Bathurst nor does it show any of the new seats as reserved to Lord Bathurst. The removal of the gallery and the erection of seats on the floor of the chapel were carried out in 1853. Amongst the seats so erected are those in question in this suit. One of the new witnesses, Mr. Boulton, who remembers the chapel before and at the time of the alterations, states in his affidavit that the coronets painted on the bench ends of these seats or pews were placed there at that time. This is borne out by an entry in the "Seating Book" produced out of the custody of the churchwardens and exhibited to the affidavit of Messrs. Newill & McGregor filed as part of the fresh evidence. This "Seating Book," which covers the period 1829–1865, was the churchwardens' record (made in discharge of their duty) of the names of the persons occupying seats and of the payments charged in respect of seats. It contains no reference as to any payment in respect of the Bathurst pew. On the contrary, under the date 1853, after recording the erection of the present seats on the floor of the chapel, it contains an entry: "Seats, coronets, Earl Bathurst Free Faculty." Again in the churchwardens' published accounts for the year 1880–81, a print of which is exhibited to Mr. H. Tovey's affidavit, Lord Bathurst is described as a holder of faculty seats.

So things remained until in 1917 the churchwardens, with the approval of the vestry, made an announcement in writing or print that they had decided to abolish all pew rents and to make the sittings of the church entirely free, but that "as they are not certain whether the existing holders of appropriated seats in the Trinity Chapel have private rights to such sittings, they will not change their present arrangements in that Chapel as they intend to do in the nave and other parts of the Church. The Churchwardens do not admit any claims of seatholders in the Trinity Chapel and no pew rents will be accepted."

There are, as I understand, no seats in Trinity Chapel to which this notice could refer other than those claimed by the petitioner, although there are or were some such seats in other parts of the church. Further communications seem to have passed between the vicar and churchwardens on the one hand and Lord Bathurst on the other, and in the result Lord Bathurst presented his petition in the Consistory Court.

The petition as amended asks first for a declaration that the petitioner as owner and occupier of Cirencester House is entitled to a proprietary right in the said pews in the Trinity Chapel.

I am not sure that I understand this claim. The Ecclesiastical Courts do not entertain suits the purpose of which is to obtain a declaration of right, although actions with that object are in accordance with the practice of the High Court of Justice. Secondly, the expression "proprietary right" used both in the original as well as in the amended petition is vague. The words seem to describe most fitly a legal right already existing independently of this Court such as prescription would confer. But, as I shall explain in a moment, this Court has no power to affirm or disaffirm a right of that sort. They probably refer to what was more accurately pleaded in the original petition—namely, the claim that the present seats should have attached to them by faculty the privileges which were alleged to have been attached by faculty to the seats for which the present seats

1921

BATHURST (EARL) v. CIRENCESTER PARISH.

The Dean of the Arches.

were substituted in 1853. If the original faculty existed or could be proved to have existed, this claim might perhaps be described as a right. If I am accurate in my supposition as to the meaning of this claim it is a repetition in other words of the claim made in the original petition, and fails for the same reason—namely, that it is based on the existence of an actual faculty which is neither produced nor proved to have been ever granted.

But the amended petition asks secondly and alternatively that the Court will in the exercise of its discretion and in view of all the circumstances decree a faculty appropriating the use of the pews in question to the use of Lord Bathurst and his successors, the owners of Cirencester House, so long as they continue inhabitants of the parish.

There are only three ways in which a claim can be asserted to seats in a church which prevents churchwardens and the Ordinary, whom for this purpose the churchwardens represent, from interfering with them. The first is by claiming prescription. If a claim is made out of long occupation of the seats in question, coupled with acts of ownership (e.g. repairs), which are only consistent with the existence of a private right, it is presumed that such a right attached to the ownership of an ancient house has been created in the past, and its continued enjoyment by the occupiers of the house will be defended. But if that claim is set up and contested, the Ecclesiastical Courts cannot decide it, and the issue must be decided in the Civil Courts: *Swetnam* v. *Archer*. (1) Lord Bathurst could not therefore set up a claim of prescriptive right in these proceedings, and he has neither done so nor has he proved facts which suggest that he could successfully assert a claim of that sort in the High Court. The second is by production of a faculty. If a faculty has been granted by the Ordinary he is bound by it. In this connection it should be added that if the owner of a faculty pew is asked to allow his pew to be removed as part, for example, of a general reseating of the church, he is entitled to similar faculty rights in a pew either on the site of his old pew or elsewhere

(1) (1724) 8 Mod. 338.

as may be agreed. Without his consent his old pew cannot be dealt with and the Ordinary ought to safeguard his rights in all cases in which they have not been expressly surrendered. This is the claim made by the petitioner in the original petition and repeated, if I understand the matter aright, as his first claim in the amended petition. It has failed because the facts do not support it. The third is by application for the grant of a faculty where none is proved to have hitherto existed. The second and alternative claim made by the amended petition is of this nature and in my view constitutes the petitioner's real case. Such faculties are very seldom granted. Their inconvenience and unsuitableness to modern ideas have been frequently pointed out by ecclesiastical judges, and as Sir John Nicholl said nearly a century ago: "A strong case should be made out to induce the Ordinary, in the exercise of a sound discretion, to appropriate any pew, by faculty, to a particular parishioner, and his family, at the present day": *Fuller* v. *Lane*. (1) The changes that the lapse of time has wrought since 1825 suggest even an added emphasis to these words. The occasions must be rare indeed which would justify the grant of such a faculty. But it is still true, as Sir John Nicholl went on to say in *Fuller* v. *Lane* (2), that cases "may arise in which a faculty of this description might be issued, with great propriety, even in these times." He goes on to give illustrations, but it is needless to follow them. Each case must depend on its own circumstances.

Turning to the circumstances of this case, I think the faculty and plan of 1718 indicate that some private rights in the seats marked in the gallery as "Allen Lord Bathurst and servants" were then admitted as existing in Lord Bathurst. They were not conferred by the faculty and they are not described in it, but they are clearly treated as existing, and the faculty does not purport to modify or vary them in any way. The plan attached to the subsequent faculty of 1780 treats the Bathurst pews precisely as they were treated in 1718. Their existence is noted and they are treated

(1) (1825) 2 Add. 419, 430, 431.

(2) 2 Add. 435.

1921

BATHURST (EARL) v. CIRENCESTER PARISH.

The Dean of the Arches.

as being outside the operation of the faculty. It may well be that the explanation is, as indeed all indications suggest, that Lord Bathurst originally built the gallery and reserved these seats for himself. It was usual to grant faculty seats in a gallery to persons who added to the seating accommodation by building it at their own expense: *Tattersall* v. *Knight.* (1) Although no faculty is now known to have been granted in 1706, all parties appear to have acted as if one had been granted, until in 1718 the Consistory Court itself treats the seats as outside the scope of its authority, or in other words as seats subject to Lord Bathurst's private rights.

From 1718 until 1853 the seats in the gallery remained occupied—apparently without question or challenge—by the Bathurst family. When in the latter year the gallery was removed and the pews on the floor of the chapel were substituted at Lord Bathurst's expense, certain of them marked in the manner already stated were occupied by Lord Bathurst and his family and have continued to be so occupied ever since. It is plain that not only Lord Bathurst and his predecessors but the churchwardens also have supposed that this continued occupation was due to some right which they describe as a "faculty." The present Lord Bathurst is an attendant at the services of the church, and shares in the activities of the parish. He and his predecessors have been large contributors to public and charitable objects in the locality.

This, therefore, is a case in which there has been continuous possession of the seats—I treat the present seats on the floor as merely substituted for the gallery seats—for upwards of 200 years; and further, at the beginning of this long period there was, in my judgment, a recognition by the Ordinary that the then Lord Bathurst enjoyed some special rights in these seats which distinguished them from the seats over which the Ordinary had jurisdiction.

So far as the petitioner is concerned, I find it difficult to conceive a stronger case for consideration, when the Court

(1) (1811) 1 Phill. 232.

is asked to grant a faculty to protect so long a user and a user with so much sanction. I use the word protection advisedly because it must be admitted that the action of the churchwardens in 1917 was a challenge of Lord Bathurst's position in respect of these seats, which he might reasonably find it difficult to ignore.

The effect upon the parishioners generally of such a faculty as is sought ought always to be anxiously regarded by the Court, and it is my duty to inquire whether the convenience of the parishioners will be interfered with, or whether the appearance of this beautiful church will be disfigured if the faculty be granted. But I do not think either of these untoward results will occur. The church is a large one. There is ample accommodation for the congregations which assemble there, and it appears from Lord Bathurst's further affidavit that the church is not usually filled at the public services. These seats are, as I have already stated, not situate in a prominent position in the nave, but are placed in a corner of a side chapel, where they can hardly affect any general scheme of reseating which may hereafter be desired by the parishioners.

It only remains for me to say a word with respect to the order of the learned Chancellor of the diocese of Gloucester. The case put forward in the original petition was, as I have already explained, quite different from that before this Court. The amended petition and the additional evidence adduced in support of it constitute a new case, which I have to decide on its merits. If I were reviewing a decision of the Court below based on the same materials as those before me, I should be very slow to interfere with the learned Chancellor's exercise of discretion in refusing a faculty. Under these circumstances, and without entering on the various matters dealt with by the learned Chancellor in the course of his judgment, I content myself with saying that I think the conclusion to which he came was inevitable on the case as presented to him, but that on the case as it now stands, I think a faculty ought not to be refused but ought to be granted. The appeal will therefore be allowed

1921

BATHURST (EARL) v. CIRENCESTER PARISH.

and a faculty will issue from this Court appropriating these pews to the use of Lord Bathurst and his successors and his and their families, so long as they continue to reside at Cirencester House in the parish of Cirencester.

Solicitors for the appellant: *Peacock & Goddard, for Sewell and Rawlins.*

C. F. J.

1921

April 26, 28.

ADMIRALTY.

THE BORRE. (1)

Admiralty—Collision action in rem—Solicitors' Undertaking to put in Bail—Withdrawal of Undertaking—Arrest of Vessel—Waiver—Amount of Bail—Value of Res—Date for Calculation of Value.

On June 22, 1920, the defendants' solicitors gave an undertaking to enter an appearance and put in bail in respect of a writ in rem claiming damages in respect of loss by collision. In consequence the defendants' vessel was not arrested. On February 17, 1921, the defendants' solicitors wrote to the plaintiffs' solicitors that their clients were unable to make arrangements for bail, that accordingly the undertaking for bail was withdrawn, and that, as the vessel was within the jurisdiction of the Court, the plaintiffs could arrest her. The plaintiffs' solicitors arrested the vessel but wrote to the defendants' solicitors that they reserved all their clients' rights under the undertaking for bail. On March 16, 1921, the vessel was appraised as being at that time of a value of 600*l.* The defendants provided bail in that sum and the vessel was released. On April 12 the plaintiffs applied for an order that the defendants' solicitors should forthwith provide good and sufficient bail, pursuant to their undertaking. It appeared that in June, 1920, the value of the vessel was much in excess of 600*l.*, and the plaintiffs estimated her value at 4500*l.*:—

Held, (i.) that the undertaking to give bail could not be withdrawn by substituting the vessel for the bail; (ii.) that the plaintiffs had not waived their rights under the undertaking by arresting the vessel; and (iii.) that the defendants' solicitors must complete their undertaking by putting in bail to the value of the vessel as on June 22, 1920.

APPEAL AND CROSS-APPEAL from an order of the assistant-registrar on an originating summons.

On June 18, 1920, there was a collision in the Thames

(1) An appeal was entered but is now withdrawn: hence the delay in publishing this report.—F. P.

1921

THE BORRE.

between the barge *Ventnor* and the steamship *Borre*, in which the barge, laden with a cargo of meat, was sunk. On June 22, 1920, the plaintiffs, the owners of the *Ventnor*, issued a writ in rem against the owners of the *Borre*, and on that day the defendants' solicitors, Messrs. Thomas Cooper & Co., gave an undertaking to appear in due course and to put in bail. On February 17, 1921, as their clients were unable to find bail, Messrs. Cooper & Co. withdrew their undertaking and suggested that the plaintiffs should arrest the *Borre*. The plaintiffs acted on the suggestion, but informed the defendants' solicitors that they (the plaintiffs) did not waive their right under the undertaking to put in bail. Meanwhile, the value of shipping had greatly depreciated, and the *Borre* was appraised on March 16, 1921, at 600*l.* only, as compared with her value in June, 1920, which was estimated by the plaintiffs at 4500*l.* The defendants, through Messrs. Cooper & Co., gave bail in the sum of 600*l.* and the *Borre* was released. Thereupon the plaintiffs applied by originating summons for an order that Messrs. Cooper & Co. should provide "good and sufficient bail" in accordance with their undertaking. The assistant-registrar ordered Messrs. Cooper & Co. to furnish further bail to the amount of 1400*l.*, the plaintiffs having provisionally agreed to accept 2000*l.*, which was the amount of the statutory liability of the owners of the *Borre* if they were entitled to limit their liability under ss. 503 and 504 of the Merchant Shipping Act, 1894. It appeared, however, that the master of the *Borre* was also part owner, and the Court having found the *Borre* alone to blame, it followed that the defendants were not entitled to limit their liability. Both parties appealed against the assistant-registrar's order.

Langton for the defendants. The plaintiffs are not entitled to be put in a better position than if they had arrested the vessel, and if the solicitors are compelled to put in bail to the value of 4500*l.* the plaintiffs would be placed in a better position. The amount should be based on the value of the vessel at the time when the plaintiffs could have got advantage of the arrest by selling the vessel under the judgment of the

1921

THE BORRE.

Court. The *Borre* is now only worth 600*l*. Further, the undertaking was withdrawn. An undertaking to put in bail merely amounts to a guarantee that the plaintiffs shall not be in a worse position than if they insisted on their right to arrest, it does not amount to an indemnity against a fall in values; and if the solicitor giving the undertaking can put the plaintiffs in a position to arrest the res he can withdraw his undertaking, just as a surety can withdraw his bail for an accused person in criminal proceedings. The plaintiffs, also, by arresting the vessel, have waived any possible right of holding the solicitors to their undertaking: *Miller* v. *James*. (1)

Balloch for the plaintiffs. The plaintiffs were entitled at the date of the writ to arrest the *Borre*, and by reason of the undertaking refrained from doing so. Consequently the defendants had the use of their vessel, then worth about 4500*l*. The amount of bail, therefore, should be the value of the vessel at the time the undertaking was given. An undertaking to put in bail implies that bail will be given with reasonable promptitude: see Order XXIX., rr. 15, 16. A solicitor's undertaking is binding and cannot be withdrawn: *In re Kerly, Son & Verden*. (2) The defendants' solicitors purported to withdraw the undertaking and the plaintiffs had no other course open to them except to arrest the vessel. Under these circumstances there is no question of waiver.

Langton in reply. This case differs from *In re Kerly* (2), as the solicitor in that case could not put the plaintiff in the same position as he would have been under the undertaking.

Cur. adv. vult.

April 28. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: The parties in this case, which came on for hearing a few days since, are at variance as to an undertaking to put in bail given at the commencement of the proceedings by the solicitors for the defendants, who have been held liable for damages. Inasmuch as undertakings

(1) (1823) 8 Moo. C. P. 208. (2) [1901] 1 Ch. 467.

of the kind in question form part of the usual machinery of the Court, and are indeed commonly acted upon as though they were in fact bail bonds and recognized by the Court in the rules and in practice as securities proper to be offered to plaintiffs with rights in rem, the controversy is of some importance. Moreover, a considerable amount is at stake.

The plaintiffs, on June 22, 1920, issued their writ in an action in rem against the defendants as owners of the steamship *Borre* to recover damages, unliquidated in amount, for the sinking in the Thames by the defendants' steamship of the plaintiffs' barge *Ventnor* with a cargo of meat. The defendants' solicitors on the same day indorsed the writ with an undertaking in common form to enter an appearance and put in bail. The *Borre* was within the jurisdiction. The plaintiffs' solicitors, in reliance upon the undertaking, refrained, as it was intended they should, from arresting the *Borre*, and she continued in the owner's service. She suffered damage by collision at sea, and was repaired, but by reason of the collision her value was reduced. She is also affected by the general depreciation in shipping values which has taken place between June, 1920, and the present time.

At one time the plaintiffs, and the plaintiffs' advisers, supposed the defendants to be entitled, under the Merchant Shipping Acts, to limit their liability in respect of the collision with the *Ventnor*. The defendants' advisers probably shared this belief. It was founded on a mistake, so far as at present appears. The only owner of the *Borre* at the time of the collision whose identity has been established was shown at the trial of the action to have been in charge of the vessel and directing her navigation at the time of the collision, for which the *Borre* was held solely to blame. In the belief that the defendants were entitled to limit their liability, the parties discussed an amount of bail. The defendants' solicitors suggested 2000*l.* as the amount for which they were bound to find bail, and the plaintiffs' solicitors were ready to accept bail for this sum. Bail, however, was not given, and in March, 1921, a correspondence took place which is in evidence before me.

1921

THE BORRE.

The President.

On February 17, 1921, the defendants' solicitors wrote to the plaintiffs' solicitors: "Our clients inform us that they are unable to make arrangements for the bail in this case, and as the vessel is within the jurisdiction of the Court, viz., at Dover, we hereby withdraw our undertaking for bail, and you will no doubt arrest the steamer." The plaintiffs' solicitors replied on February 18: "We are in receipt of your letter of yesterday's date which was received by us late yesterday afternoon, and having regard to the terms thereof, we, as suggested by you, at once arrested this vessel. We had, of course, no option but to arrest the vessel under the circumstances, but at the same time we reserve all our clients' rights under the undertaking for bail given by you." On February 21 the defendants' solicitors wrote: "As you were in a position to arrest this vessel and in fact did so, we regard our undertaking as entirely superseded." The plaintiffs' solicitors on February 23 wrote insisting upon their clients' rights under the undertaking. The next day the defendants' solicitors acknowledged receipt of the letter, adding: "As you know quite well, we have acted in accordance with our rights and in the manner which has been approved by the judges of the Admiralty Court on similar occasions." On February 28 the plaintiffs' solicitors gave the defendants' solicitors notice that they had learned the true facts as to the value of the ship and the position of the owners relative to limitation of liability, and they added: "With regard to the question of bail, we propose applying by motion to the Judge to compel you to fulfil your undertaking. It is needless to say that such a course would be most distasteful to us." The answer on March 1 was: "We have no doubt the Judge will follow the course which is recognized as the practice of the Court in such circumstances."

The *Borre* was arrested on February 17, and on March 16, 1921, was appraised at a then value of 600*l*. The owners, through their solicitors, provided bail in that amount, and the vessel was released. The plaintiffs' solicitors applied on April 12 by summons for an order "that the defendants' solicitors do forthwith provide good and sufficient bail"

1921

THE BORRE.

The President.

pursuant to their undertaking. Upon the hearing in the Registry the correspondence which evidenced a provisional consent of the plaintiffs to accept bail in 2000*l.* was read. The assistant-registrar also had before him information not on oath as to the opinion of the valuer by whom the appraisement had been made concerning the value of the *Borre* at the date of the writ. This value was probably not less than 4000*l.*, and was certainly much in excess of 600*l.* or of 2000*l.* Treating the correspondence as evidence of an agreement as to amount of bail, the assistant-registrar ordered the defendants' solicitors to complete bail in an amount of 1400*l.* additional to the bail for 600*l.* already given.

Both parties have appealed against the order made in chambers. The defendants' solicitors contend that no order ought to have been made, and the plaintiffs contend that bail should have been ordered to the full amount of the value of the *Borre* at the date of the undertaking to put in bail. Both parties disclaim the suggested agreement for bail in 2000*l.* upon which the order already made depends, and the dispute between them must now be decided without regard to that consideration.

For the solicitors, Mr. Langton argued before me that they were entitled to determine their liability under their undertaking as soon as the *Borre* was identified by them to the plaintiffs as being within the jurisdiction and subject to arrest. He also argued that the arrest which in fact took place operated as a waiver of the plaintiffs' rights under the undertaking. Alternatively he insisted that the bail given after the arrest and appraisement was available and sufficient to satisfy the undertaking. The case made by Mr. Balloch for the plaintiffs was that the undertaking bound the solicitors to provide bail to the full value of the *Borre* at the date when it was given, and that it remained in force notwithstanding the subsequent arrest and liberation on bail of the vessel.

Mr. Langton supported his claim to require the arrest of the ship, and consequently the release of the undertaking, by reference to the case of bail given in criminal Courts by sureties for the appearance of an accused person to take his

1921

THE BORRE.

The President.

trial. I do not think that there is a real analogy. The bail in criminal cases is given to secure the due attendance upon justice of the person bailed. The bail in actions in the Admiralty jurisdiction is given to secure satisfaction of a claim—in full or to a limited amount. The practice as to the surrender or arrest of an accused person and consequent discharge of his sureties is incidental to a different branch of law from that administered here, and throws no light on the matter now in debate.

The first question between the parties is that of the meaning of the undertaking. Is it an undertaking to produce the ship and therefore satisfied if, pending the cause, the ship is offered for arrest under conditions upon which arrest can be made; if not, does it require the finding of bail for the value of the vessel at the date when the undertaking was given, or for the value at some subsequent time when the plaintiffs or the defendants proceed to an appraisement or inquiry? To the claim made in February by the defendants' solicitors for release from their undertaking upon their pointing out the *Borre* in a position in which she could be arrested, there are various substantial objections. They undertook to provide bail, and thereby to secure to the plaintiffs a sum of money. In place of a contingent right over the proceeds of a ship in the custody of the marshal, they gave the plaintiffs a contingent right over a fund in pounds sterling. To call on the plaintiffs, even at once, to resume their former situation, would simply be to undo the transaction of which the undertaking was the pledge. To my mind the proposition that the plaintiffs were bound to submit to such a divestment of their right is unarguable. What is actually sought now is, however, something more—namely, that the plaintiffs should be required to accept the ship as security when her value has become insignificant. Mr. Langton produced no authority for such a demand, and upon inquiry in the Registry I have not been able to find any case in which the Court has given effect to such a demand. I reject, therefore, the contention that the plaintiffs were bound to rearrest the *Borre* and give up the solicitors' undertaking.

1921

THE BORRE.

The President.

The undertaking subsisting, the plaintiffs claim that it shall be fulfilled by the filing of a bail bond so conditioned that if the defendants do not pay what may be adjudged against them in this action, with costs, execution may issue against their sureties for a sum not exceeding the value of the ship. The defendants claim that the value of the ship having been appraised at 600*l.* the bail already given in that amount satisfies the undertaking. There are some objections to this contention which were not argued and which I shall not discuss. The question debated before me was that of the date at which the value to be limited in the bond is to be ascertained. The obvious answer seems to me to be that the undertaking speaks as of the date when it was given. A promise on June 22, 1920, to give bail to the amount of the value of the *Borre*, did not mean the value as it was in 1919 or as it should or might be in 1921, but as it then was. To act upon any other view would be to convert into a mere speculation a business transaction which was intended to produce certainty. Cases in which the Court has altered the amount of the bail given upon release of a ship relate to error in computation, and do not give any countenance to the suggestion that the liability to give bail for a ship released in an action in rem fluctuates from time to time pending the cause. I hold, therefore, that the undertaking requires by its terms the completion of bail to the amount of the value of the *Borre* on June 22, 1920.

There remains the question whether the plaintiffs have waived their rights under the undertaking. In support of the affirmative view reliance was put upon a case in the Court of Common Pleas: *Miller* v. *James*. (1) There, a solicitor, whose client was sued for debt, undertook to procure the client's signature to a cognovit. The effect of this acknowledgment of the plaintiff's claim would have been to entitle him to sign judgment and proceed to execution in the action if default in payment were made by the defendant. The plaintiff, upon being told by the solicitor that he could not or would not procure the cognovit, replied that "he would

(1) 8 Moo. C. P. 208.

1921

THE BORRE.

The President.

not be severe and would proceed with his action." The Court said the enforcement of the undertaking was a matter of discretion, and that the plaintiff's election to go on with the action was virtually a waiver of his rights against the solicitor. The question of waiver in the present instance cannot be determined by the authority of the case cited. If there were clear proof that the plaintiffs here had elected to arrest the *Borre* and to release the solicitors from their undertaking *Miller* v. *James* (1) would be an authority against them. In fact, what the plaintiffs did was to arrest the ship with notice to the solicitors that they held them bound by their undertaking. What is to be determined is whether the arrest was so wholly inconsistent with any claim upon the undertaking that once arrest was made the undertaking must be treated as discharged. I think it was not. The ship was the property of the defendants. The undertaking created a personal obligation on the part of the solicitors. The security of the ship and the security of the undertaking are not in their nature incompatible. There was no doubt an implied term of the undertaking that if bail were given no arrest should be made, but the solicitors refused to give bail and invited an arrest. They could not properly do this, and to allow them now to profit by the state of things so brought about would be, in my opinion, substantially unjust.

Additional bail must be given forthwith to make up in all the value of the *Borre* as on June 22, 1920. If the parties do not agree the amount will be determined in the Registry. The solicitors must pay the costs of these proceedings.

Solicitors for the plaintiffs: *Ingledew, Davies, Sanders & Brown.*

Solicitors for the defendants: *Thomas Cooper & Co.*

(1) 8 Moo. C. P. 208.

E. C. M. T.

DIVORCE.

1921
May 6, 10, 11, 12, 31.

C. (OTHERWISE H.) *v.* C.

Divorce—Nullity—Impotency quoad hanc—Sufficiency of Averment—Conflict of Evidence.

An averment of impotency quoad hanc was held by the Ecclesiastical Courts, and has been held ever since, to be sufficient to support a decree of nullity.

There is no rule of law or practice that in cases of nullity, where the evidence of the parties is conflicting and the medical evidence is consistent with either story, the Court will not act on the evidence of the petitioner if it is contradicted by the respondent.

The ruling of Dr. Lushington in *N.* (*falsely called M.*) v. *M.* (1853) 2 Rob. Ecc. 625, 630, and Lord Selborne in *G.* v. *M.* (1885) 10 App. Cas. 171, 196 followed.

U. (*falsely called J.*) v. *J.* (1867) L. R. 1 P. & M. 460 explained.

THE petitioner in this case claimed a decree for nullity of marriage on the ground that the marriage had not been consummated, because of the impotency of her husband. The husband denied this and gave evidence that intercourse had taken place in the usual way. Medical evidence was called, which was inconclusive, but, as the Lord Chancellor held, was possibly consistent with the wife's evidence, and wholly inconsistent with the husband's.

The parties were married on August 4, 1911. They lived together until 1914, when the husband rejoined his old Yeomanry regiment and went to the war. He returned to the petitioner from the army in January, 1919, and shortly afterwards she left him and commenced these proceedings.

Sir John Simon K.C. and *Noel Middleton* for the petitioner.

Sir Ellis Hume-Williams K.C. and *Sir Harold Smith* for the respondent. In cases of nullity the Court will not act on the evidence of the petitioner if it is denied by the respondent: *U.* (*falsely called J.*) v. *J.* (1)

The rest of the argument was a discussion of the facts.

Cur. adv. vult.

(1) L. R. 1 P. & M. 460.

1921

C. (OTHERWISE H.) *v.* C.

May 31. LORD BIRKENHEAD L.C. It is not usual in these proceedings to meet with contests of fact, but when such a contest does arise the difficulty of arriving at a decision is extreme, for the chief actors are the only available witnesses on the most important issues. The petitioner must remove all reasonable doubt, for she has undertaken the burden of proof, and it is important in such a case that she should be compelled to discharge the burden, for the charge made, though physical and not moral, is nevertheless a grave and wounding imputation that the respondent is lacking, at least quoad hanc, in the power of reproducing his species, a power which is commonly and rightly considered to be the most characteristic quality of manhood. The allegation made in the present case is not that the respondent completely lacks the capacity of reproduction. As in many other cases, it is urged that he is incapable of consummating this particular marriage with this particular woman.

Doubts were formerly entertained whether an averment that a respondent is impotent quoad hanc is valid to support a decree of nullity. Both before and after the Council of Trent, the doctrine of the Church admitted, and indeed enjoined, nullity on such a ground.

Thus Sanchez (Disputationes de sancto matrimonii sacramento, 1654, Book 7, vol. ii., p. 336) states the law, as gathered from Thomas Aquinas and Albertus Magnus, in such a form as to admit of no other conclusion. From that passage I will only quote two sentences: "Quid refert, sive a natura, sive ex accidenti"—the "accidens" here considered being the lack of inclination of a particular man to a particular woman—"impotentia promanet, (1) ad irritandum matrimonium? Si vere impotentia utraque sit, impediatque potestatem tradendi corporis ad copulam conjugalem: eo quod illud accidens reddat eam impossibilem." And again: "Quacunque ex causa impedimentum perpetuae impotentiae consurgat, dissolvetur matrimonium ea cognita, utpote quod irritum fuit."

(1) This compound verb *promanare* is noted in the list of barbarous and unauthorized words at the end of Forcellini's lexicon. In the next line the sense appears to require *alterutra*.—F. P.

1921

C. (OTHERWISE H.) v. C.

Lord Birkenhead L.C.

"Perpetua," as is obvious from the context, is used to describe a condition in relation to a particular woman, subsisting "mediis adhibitis ac experientia triennali praemissa."

Recent authority on this point is scanty. It was stated in the course of the argument in *N.* (*falsely called M.*) v. *M.* (1), that the only case in the books, and that was collusive, in which a sentence of nullity quoad hanc had been pronounced is that of *The Countess of Essex.* (2) No doubt there were circumstances of grave suspicion in *The Countess of Essex's Case* (2), and doubts appear to have been entertained by the minority of the Court as to the validity of a decree based upon the quoad hanc doctrine. But the true ground for questioning the propriety of the decision in that case rests rather upon the nature of the evidence adduced to prove the virginity of the petitioner. The memorandum in which the then Archbishop embodied his doubts is so confused that it is impossible to ascertain whether they related to the facts or the law. I assume it to be true that no case can be found in the books between 1613 and 1853. I have myself been unable to find any such case during that period, though in *The Duchess of Kingston's Case* (3), Thurlow A.-G., arguendo, states boldly, and as if enunciating a platitude, that the fact of a man divorced propter impotentiam marrying another woman and having children does not prove the judgment false, "for one may be habilis quoad hanc."

It is not until the judgment of Dr. Lushington in *N.* (*falsely called M.*) v. *M.* (4), that we find any reasoned discussion in the matter. Here, however, we reach firm ground. The report of the inspectors in that case was that M. was impotent as regards the said N.; Dr. Lushington faced the consequences of this limitation, but he says (5): "Does the rule of law do more, or rather can it by possibility do more? The rule of law and the report necessarily go on the same grounds, and no other, the non-consummation after opportunity. Who by possibility can say that such a man is necessarily impotent

(1) 2 Rob. Ecc. 625, 630.
(2) (1613) 2 St. Tr. 786.
(3) (1776) 20 St. Tr. 355, 461.
(4) 2 Rob. Ecc. 625.
(5) 2 Rob. Ecc. 635.

1921

C. (OTHERWISE H.) v. C.

Lord Birkenhead L.C.

as to all women? It may be so, or it may not. There can be no evidence to establish the affirmative, as the evidence of such cohabitations is necessarily impossible. The utmost that can be said is, that there might be something of a guess made, by reason of the one failure; that the probability is that a man, impotent quoad hanc, would be impotent as to all; this however would be inference, not proof. Who can tell the physical cause of that one failure, when the man is apparently without defect?" I believe that the doctrine thus stated is as sound in law as it is consonant with common sense.

It was adopted and approved by Lord Selborne L.C. in *G.* v. *M.* (1) The rarity of reported cases upon the subject is not to be attributed to any doubt as to the law. Decrees of nullity must have been pronounced again and again upon evidence of opportunity accompanied by failure. Where, as often happens, the failure is not explained by any patent defect, it is neither necessary nor indeed possible to prove the universal negative.

[His Lordship then stated the nature of the case to be proved, and continued :] There has, in the present case, been sufficient cohabitation to enable the petitioner, if believed, to maintain a charge against her husband of incompetence quoad hanc. And in order to dispose at once of the question of delay, I record my opinion that, having regard to the intervention of the war, no inference of want of sincerity on the petitioner's part can be drawn from the fact that nearly ten years have elapsed since her marriage on August 2, 1911, and seven years since the accusation of incapacity was first made and denied. Delay may prove want of sincerity : see *G.* v. *M.* (1), and the comments upon that decision in *L.* (*otherwise B.*) v. *B.* (2) ; it may also be used by a jury or judge sitting without a jury, as a touchstone for testing the truth of the witnesses. In neither respect can the delay that has occurred be so used in this case. And here I must refer to a case which was cited to me on behalf of the respondent, *U.* (*falsely called J.*) v. *J.* (3) I have considered the judgment in that case, but do not think it supports the proposition that where the medical evidence

(1) 10 App. Cas. 171, 196. (2) [1895] P. 274. (3) L. R. 1 P. & M. 460.

1921

C. (OTHERWISE H.) v. C.

Lord Birkenhead L.C.

is consistent with either story, the Court will not act upon the testimony of the petitioner if it be contradicted by the respondent. It is obvious when that case is examined that the Judge Ordinary did not accept the petitioner's evidence, and that if he had accepted it he would have granted relief. He said (1): "To pronounce a marriage invalid on the unsupported oath of the party who seeks to be relieved from its obligations is a serious matter . . . . only to be done when the last trace of reasonable doubt as to the truth and bona fides of the case has been removed. If there be a direct conflict of testimony between the two parties who alone know the truth . . . . the difficulties are much increased." That is good law and good sense, but the fact that the difficulties are increased does not make them insuperable in such a case, nor is the Court relieved from the duty of weighing the evidence merely because the parties, who alone know the truth, tell different stories, one of which at least cannot be true.

[His Lordship then examined all the evidence, medical and other, and continued :] In my opinion the medical evidence, which is possibly consistent with the wife's evidence, and wholly inconsistent with the husband's, gives me the necessary guidance. Her story may be true ; his cannot be.

In these circumstances, after giving consideration to the details of the case and allowing weight to the fact that I cannot accept the petitioner's recollection on all points as accurate, I have come to the conclusion that her story as to the material facts is the true one ; that the marriage has never been consummated ; and that over a period of years the respondent has endeavoured without success to consummate it. It follows from these circumstances that he is and always has been incapable of consummating this particular union with this particular woman.

For these reasons I decree that the marriage shall be declared null. The petitioner must have her costs.

Solicitors for petitioner : *Pickering & Co.*

Solicitors for respondent : *Lewis & Lewis.*

(1) L. R. 1 P. & M. 461.

J. R. B.

1921
July 4.

DIVORCE.

VER MEHR *v.* VER MEHR.

Husband and Wife—Restitution of Conjugal Rights—Alimony pendente lite—Time for applying—Disobedience to Decree for Restitution—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 2.

The jurisdiction of the Court to provide alimony for a wife pendente lite, in the case of proceedings for restitution of conjugal rights by a wife, extends until the proved disobedience by the husband to a decree for restitution, after which the Court has jurisdiction under the Matrimonial Causes Act, 1884, to provide her with permanent maintenance.

The wife's right to an order for alimony pendente lite is not affected by the fact that the order is not made until after the decree for restitution.

THIS was a wife's petition for restitution of conjugal rights. She filed her petition for alimony pendente lite. The principal petition came before the Court on June 15, 1921, and as the husband had appeared but filed no answer, the usual order was made. The petition for alimony was not reached in chambers until May 16, 1921, and objection was then taken by the husband that there being no lis pendens the application was out of time and no order could be made. This contention was overruled, and the husband appealed by summons to the judge in chambers. This summons was adjourned into Court and now came on for hearing.

Noel Middleton for the summons. The "lis" in the case of a suit for restitution of conjugal rights cannot be "pendens" after the decree: *Latham* v. *Latham*. (1) The later decision of *Ellis* v. *Ellis* (2) does not apply to a suit for restitution. It only applies to an action for divorce.

Cotes-Preedy for the wife. *Latham* v. *Latham* (1) was expressly overruled by *Ellis* v. *Ellis* (2); and the reasons given for the decision apply exactly to a suit for restitution.

SIR HENRY DUKE P., after stating the facts, proceeded: This case raises a question of practice which has to be determined. The husband appeals from the order on the ground

(1) (1861) 2 Sw. & Tr. 299. (2) (1883) 8 P. D. 188.

that the Court has no jurisdiction to order maintenance pendente lite. *Latham* v. *Latham* (1) was referred to in support of that proposition, but that case was overruled by *Ellis* v. *Ellis*. (2) So the question comes before me bare of any authority. I have to see how the matter stands.

First of all, with regard to the matter of convenience, what is said is that the decree of restitution of conjugal rights having been made promptly in this suit, the petitioner's maintenance is limited by the date of the decree, and that although the respondent, the husband, might not be in default under the decree for a period of many months if he were resident on the other side of the world, nevertheless during that period no provision by way of alimony pendente lite can lawfully be made for the wife; and, on the other hand, the statutory power of the Court to make provision for her permanent maintenance would not arise until the respondent was in default under the decree. That result can hardly have been intended by the Legislature.

On the question of principle the statutes governing the jurisdiction must be looked at. By the statutes provision is to be made for the maintenance of the wife during the suit, and there is a direction in the Matrimonial Causes Act, 1884, that the mode of enforcing the decree, if the husband disobeys it, shall be not his commitment to prison, as would have been the case in former times, but a decree of the Court providing for permanent maintenance for the wife. If the argument for the respondent were accepted there would be a hiatus between the period of maintenance pendente lite and the period for which the Court may decree permanent maintenance; and if I had to look solely to the statute of 1884, I should have taken the view that the decree for alimony pendente lite must remain in force until the wife has, at any rate, been put into a position to obtain maintenance by a permanent order. The thing does not rest there. The power of the Court to order maintenance to a deserted wife is much older than the Matrimonial Causes Acts of 1857 or 1884. It is a power derived from the old Ecclesiastical

1921

VER MEHR v. VER MEHR.

The President.

Courts which regulated relations arising out of the marriage state. If reference is made to the powers of the Court at the time when the jurisdiction in restitution arose, it will be found that a citation issued by the Court at the wife's suit made the husband a party subject to the jurisdiction of the Court, and he remained subject to it until there had been obedience to the decree of the Court or the decree had been discharged by some other means. The statute of 1884 has relieved him from the liability to be committed, but I cannot doubt that the ancient jurisdiction of the Court to give relief in suits for restitution of conjugal rights survives with sufficient completeness to enable the Court to give direction as to the wife's maintenance until there has been disobedience to the decree.

It seems to me that upon reason and convenience, upon the terms of the statutes, and upon the ancient practice of the Courts, there is clearly jurisdiction to support the Registrar's order.

The President then dealt with the question of the amount of maintenance to be paid and confirmed the order.

Solicitors for petitioner: *Dunderdale & Dehn.*

Solicitors for respondent: *Lawrance, Webster, Messer & Nicholls.*

J. R. B.

DIVORCE.

1921
June 24, 29;
July 1, 5.

FRANKLIN *v.* FRANKLIN AND MINSHALL.

Husband's Petition for Divorce—Costs of guilty Wife—Order of Registrar for payment of taxed Costs and Security—Decree made before Husband in Default—Order still Valid—Wife's Affidavit of Merits—No Denial of Adultery in Affidavit—At hearing neither Wife nor Co-respondent put into Witness Box—Sufficiency of Affidavit—Duty of Wife's Solicitor—Practice Memorandum on Divorce Rule 158 *issued by Sir F. Jeune in* 1902—*Right to question Wife as to Adultery—Evidence Further Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.

The fact that a decree nisi is made before the time fixed by the registrar's order for the husband giving security has expired, does not prevent that order being effectual.

It is the established principle of the Court that a wife cannot in any interlocutory proceedings be asked to deny on oath the adultery with which she is charged; and this principle applies as well to proceedings to make the husband pay or give security for costs as to other proceedings.

An affidavit by the wife that she is advised she has a good defence on the merits is a sufficient compliance with the Memorandum on Divorce Rule 158 issued by Sir F. Jeune in 1902, directing the registrars to require an affidavit of the merits from the wife and her solicitor on her application against the husband for payment of taxed costs and security for costs of hearing.

The practice as to asking a wife respondent for the address of the co-respondent discussed.

HUSBAND'S PETITION FOR DIVORCE.

The petition, which alleged a specific instance of adultery between the wife and the co-respondent, was filed on February 8, 1921, and was served on both respondent and co-respondent on February 10. There was some evidence at the hearing that on being served with the petition the wife had confessed her adultery, but this her solicitor did not know. Both the respondent and the co-respondent appeared but filed no answers, and on March 11 the petition was set down in the undefended list. Thereupon the wife and the co-respondent applied for leave to file answers, and leave was given on March 23. Both filed answers on May 17. Each was a simple denial of the adultery. The case was then put into the defended list with a direction that it should not be heard before June 20. On June 17 the wife's solicitor

1921

FRANKLIN v. FRANKLIN AND MINSHALL.

applied in chambers for the usual order as to the wife's costs. On June 21 the registrar made an order that the husband should pay into Court 45*l.* 9*s.* 10*d.* for taxed costs already incurred by the wife, and should also within seven days lodge in Court 65*l.* to cover the costs of trial. There was some dispute whether the order contained a direction that the wife should file an affidavit of merits. It was not so drawn up, and McCardie J. afterwards decided that no such order was made, but that the wife's solicitor had undertaken to file an affidavit of merits as soon as possible. The husband appealed from the registrar's order as to costs on the ground that the wife had separate estate. On June 24, before this appeal was heard, the case came on for trial. Counsel who appeared for both the wife and the co-respondent said that he was not in a position to put either of his clients into the witness box. McCardie J. on the evidence granted a decree nisi to the husband. The wife's counsel asked for the usual order for her costs, but the judge adjourned the hearing of that point until after the decision on the appeal as to the wife's costs. On the day of the hearing of the action the wife filed an affidavit as to merits in which she did not specifically deny the adultery, but swore that at the time of filing her answer she was advised that she had a good defence on the merits. Her solicitor filed an affidavit to the same effect. Both affidavits were filed as soon as possible. On June 27 the husband's appeal as to costs was dismissed by Horridge J. On June 29 the case came on again before McCardie J., but it was again adjourned for the cross-examination of the wife's solicitor. On July 1 the solicitor and his London agent were cross-examined, and the case was argued.

T. Bucknill for the wife. It is the settled rule of the Court that in interlocutory proceedings no questions may be asked or evidence given on the issue of adultery. The wife cannot therefore be required to make an affidavit denying the adultery: *Bass* v. *Bass.* (1)

(1) [1915] P. 17.

W. O. Willis for the husband. First, the husband was not in default when the case was heard, and upon the decree nisi being made the registrar's order ceased to have any effect: *Bridgman* v. *Bridgman* (1); *Gough* v. *Gough*. (2) Secondly, the wife has not complied with the order or undertaking that she should file an affidavit as to merits. The memorandum issued by Sir F. Jeune P. in 1902 was intended to prevent the husband having to pay the costs of a defence which ought not to be set up. It was obvious here that the wife could have no defence unless she denied the adultery, and her affidavit should have contained a denial: *Robertson* v. *Robertson* (3); *Smith* v. *Smith* (4); *Ash* v. *Ash*. (5) In *Walker* v. *Walker* (6) Gorell Barnes J. held that the solicitor had been negligent in a case very similar to this. In *Townson* v. *Townson* (7) Sir F. Jeune P. refused to allow the usual order as to costs without the solicitor producing evidence that he had acted reasonably.

[McCardie J. I do not follow the principle of those cases. Is the solicitor to make himself the judge whether his client has committed adultery or not?]

If the solicitor sees that the evidence is criminating he must tell his client that he must look to her for costs, for he will not be able to get them from the husband. I am not charging the solicitor with misconduct. I only say he ought not to look to the husband for his costs.

T. Bucknill in reply.

Cur. adv. vult.

July 5. McCardie J. [after stating the facts as above]. Mr. Willis for the petitioner submitted in the first place that as the case was heard before the husband had complied with the order for security (he, the husband, not being in default) the order of the registrar of June 21 became of no effect. It is clear that the husband was not in default on June 24, when I granted the decree. I must decide against this

(1) (1869) 20 L. T. 87.
(2) (1864) 33 L. J. (P. & M.) 136.
(3) (1881) 6 P. D. 119.
(4) (1882) 7 P. D. 84.
(5) [1893] P. 222.
(6) (1897) 76 L. T. 234.
(7) (1898) 78 L. T. 54.

1921

FRANKLIN v. FRANKLIN AND MINSHALL.

McCardie J.

contention. In my view the accident that the hearing takes place before the husband is in default in giving security does not in itself destroy the wife's right to the usual order for costs. Promptitude by the wife in application is most desirable, but delay is not necessarily fatal. The two decisions cited by Mr. Willis on this point, *Bridgman* v. *Bridgman* (1) and *Gough* v. *Gough* (2) do not really assist him. At the most both cases merely illustrate an exercise of discretion.

The next point raised by Mr. Willis was that the wife had not complied with the order or undertaking that an affidavit of merits should be filed on the wife's behalf. He submitted that such an affidavit involved an express denial of adultery, and that it did not suffice for the wife to say on oath that she had a defence on the merits. This is a serious matter. It raises a question of principle.

In Shelford on Marriage (1841), at p. 533, it is said: "The general rule is, that the husband must pay the costs incurred by the wife in a suit for a divorce." This broad rule expresses the basic notion on the matter both before and after the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

I agree with Mr. Rayden's statement (Divorce, p. 136), that the practice as to security for a wife's costs springs from the assumption that the wife (as in the case now before me) has not sufficient separate estate to carry on or defend a suit against her husband, and that it is in the nature of a protection to the wife's solicitor, and through him, of her.

In *Robertson* v. *Robertson* (3) Jessel M.R. says: "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence." Later on he says (4): "No man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery." Brett L.J. says (5): "There is no foundation for saying that it is unjust as against the husband that he should pay the

(1) (1869) 20 L. T. 87.
(2) (1864) 33 L. J. (P. & M.) 136.
(3) 6 P. D. 119, 122.
(4) 6 P. D. 123.
(5) 6 P. D. 124.

costs of his wife's defence, whether that defence be finally made out or not. I entirely agree that no high-minded husband would grudge the expense of enabling the wife to defend herself against such a charge as this."

Bearing these passages in mind I turn to the ground on which Mr. Willis bases his contention. It rests on a memorandum issued by Sir F. Jeune on June 21, 1902 (vide Rayden on Divorce, p. 137). So far as material it says: "On application under r. 158 for an order for payment of costs up to setting down, and for security for costs of hearing on behalf of a wife whose defence is a simple denial, she shall be liable, should the husband require it, to be called upon to furnish an affidavit by herself and her solicitor that she has good grounds of defence on the merits of the case."

Mr. Willis argued that this means that the wife can be called on to make an express denial of the adultery. Mr. Bucknill contends that the memorandum means that the wife can be called on only to say that she has a defence on the merits, without expressly denying the adultery. He further submits that if the interpretation of Mr. Willis be right, then the memorandum is ultra vires and contrary to established law.

I feel bound to say, with the deepest respect, that the memorandum seems to me to be open to serious criticism.

Long before that memorandum the prima facie right of the wife to security had been settled by many decisions. A wife should not be left helpless and undefended.

It must be remembered that an order for security does not necessarily mean that a wife gets her costs. That question ultimately depends on the decision of the judge at the trial, after hearing such evidence and making such investigation as he thinks right.

It is a fundamental rule of justice that the husband shall prove the allegations of adultery that he makes. The burden is on him to prove, and not on the wife to disprove adultery. That burden rests on him. It co-exists with the prima facie right of the wife to security against him, so that she may

1921

FRANKLIN v. FRANKLIN AND MINSHALL.

McCardie J.

be able to meet the gravest charge that can be made against her.

Now is a requirement (if it exists) that a wife shall deny her adultery ere she gets security one which is consistent with legal principle or binding legislation? In my view the answer is "No." The matter, I think, comes to this, can the husband say to the wife: "Before I give security I put to you the question for answer on oath—Have you or have you not committed adultery?" In my opinion such a question cannot be put as a condition of security for costs.

The Evidence Further Amendment Act, 1869, s. 3, says: "No witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." I ventured to discuss that section in my judgment in *Hensley* v. *Hensley and Nevin.* (1)

In his famous judgment in *Redfern* v. *Redfern* (2), Bowen L.J. said: "But it is contrary to the principles of law recognised alike in the Common Law Division, the Chancery Division, and the Ecclesiastical Courts, that a wife or husband should be compelled to answer on oath as to matters tending to shew adultery, whether in the shape of discovery of documents or otherwise, and the legislation affecting the Divorce Court has done nothing to disturb, but much to recognise, this, to my mind, salutary principle."

Significant also are the words of Kennedy L.J. in *Bass* v. *Bass* (3) where he says: "The Court is always obedient to the statute which provides that questions are not to be put to parties in interlocutory proceedings involving an answer as to whether they have committed adultery; and it is also clear that the Courts have always been and will be careful to see that interlocutory proceedings as to alimony, discovery, or interrogatories shall not be used so as to prejudice the

(1) (1920) 122 L. T. 814. (2) [1891] P. 139, 149.
(3) [1915] P. 17, 20.

fair treatment of the matter in question in the action." Swinfen Eady L.J. expressed a similar view.

These matters gravely impair and I think destroy the argument of Mr. Willis that a wife's right to security (where she simply denies misconduct) depends on the condition precedent that she shall deny adultery on oath. Still more gravely do they impair it when it is remarked that prima facie there is a right to cross-examination in a deponent on her affidavit.

Mr. Willis sought to strengthen his position by referring to the practice sometimes adopted of asking the wife for the name and address of the co-respondent. This practice (if it exist) is said to spring from the requirement of s. 28 of the Matrimonial Causes Act, 1857, that the husband shall make the alleged adulterer a co-respondent, unless the Court on special grounds excuse him from so doing. The strong requirements of the Court, if the adulterer be known, are indicated by the recent case of *Rush* v. *Rush* (1) in the Court of Appeal; the practice on the point is well stated in Rayden on Divorce on p. 109.

I was referred to the case of *Grose* v. *Grose*. (2) There the husband had presented a petition on the ground of his wife's adultery. He asked for leave to proceed without a co-respondent, on the ground that his name and address were unknown. The President, Sir Francis Jeune, said that the solicitor for the husband should write to the wife, make an appointment, and see her for the purpose of eliciting the desired information. I do not think that this case can be properly cited as a precedent. There the wife had written admitting the misconduct, and had referred to a certain "young man." Apparently she not only did not deny the adultery, but was probably anxious and willing to give further information. This case can scarcely afford a basis for any practice of asking the wife for the name of the adulterer, and can, I think, have no application whatever in any event where the wife has denied or has not admitted the misconduct.

(1) [1920] P. 242. (2) (1897) 78 L. T. 89.

1921

FRANKLIN v. FRANKLIN AND MINSHALL.

McCardie J.

I find nothing in the decision of the Court of Appeal in *Saunders* v. *Saunders* (1) to support any rule to the effect that a wife, who has not admitted misconduct, should be asked for the name and address of an alleged adulterer. If a wife is asked for the name and address of the adulterer, it seems to me that the request involves a demand for an admission of adultery. The one thing is necessarily interlinked with the other. Mr. Willis finally admitted his difficulty to adequately defend such a request. For the request in substance is one from the husband to the wife that she shall assist him in proving her own misconduct and destroying her own future.

I need say no more of *Grose* v. *Grose* (2) except to add that it may well be contrasted with the decisions already cited by me, and with cases such as *Hallam* v. *Hallam* (3) where Bucknill J. strongly condemned a solicitor's clerk who when serving the papers sought by questions to obtain from a husband an admission of his adultery: see Phipson on Evidence, 5th ed., p. 204.

I point out that a respondent wife may succeed at the hearing, not only by reason of a denial in the witness box of the misconduct, but also (inter alia) by the lack of evidence by the husband to prove the adultery charged.

Without further discussing the memorandum of 1902, I hold that it does not require an express denial by the wife of the adultery. I further hold that it suffices, to comply with that memorandum, if a wife states on oath that she has a defence on the merits. In my view the affidavits here filed are sufficient. The points raised as to the validity of the memorandum of 1902 can be dealt with in some other case by the learned President, whose knowledge and experience are far greater than my own. I have, however, felt bound to express my views on the matter in view of the powerful contention of Mr. Bucknill.

The final point raised by Mr. Willis was that the circumstances here showed that the solicitor ought not to have undertaken the defence of the case.

(1) [1897] P. 89. (2) (1897) 78 L. T. 89. (3) (1903) 20 Times L. R. 34.

The position of a wife and her solicitor as to costs is discussed in Rayden on Divorce, p. 196. Many cases have been cited to me. The basis of all the cases is still to be found in *Robertson* v. *Robertson* (1) above quoted. The extended duty of a solicitor is well indicated by Lord Hannen in *Smith* v. *Smith* (2) where he says: "Nor do I think that a solicitor, as soon as he discovers that the wife cannot deny the charge made against her, is bound to abandon her. If he did so, it would cause her to seek the assistance of some less scrupulous adviser. There is an honourable way of defending the worst of cases." In my opinion those are sound words. A solicitor for a wife charged with adultery is in a responsible and delicate position. He is a professional adviser and helper. He is not a judge charged with the grave duty of deciding whether the wife be in fact guilty of the adultery alleged. To impose such a duty on him would be unfair and might be disastrous. A solicitor may also properly form the view that whether the wife be guilty or not, yet the case against her must fail for lack of evidence. He should do his best to defend her by all legitimate and honourable means, and by the use of all proper technical steps. In certain cases I agree that he should not defend at the husband's costs, e.g., where he is fully satisfied that the evidence is substantially conclusive, or e.g., where the wife to his knowledge has bona fide confessed in the presence of several responsible persons: see *Townson* v. *Townson* (3) per Sir F. Jeune P.

I venture most respectfully to think that Gorell Barnes J. in *Walker* v. *Walker* (4) impliedly placed too heavy a burden on a solicitor by the rule he suggested. The logical conclusion of his judgment might well be that a solicitor should be a judge rather than a professional adviser. I venture to say that the opinion of Gorell Barnes J. in that case, if correctly represented by the last two paragraphs of the headnote, is not consonant with other and binding authorities.

I agree that a solicitor must act bona fide. I also agree

(1) 6 P. D. 119.
(2) 7 P. D. 84, 89.
(3) 78 L. T. 54.
(4) 76 L. T. 234.

1921

FRANKLIN v. FRANKLIN AND MINSHALL.

McCardie J.

that he must act with reasonable care and propriety. His primary duty, however, is to defend the wife and not to assist the husband.

The burden is ever on the husband to prove the adultery he alleges.

In deciding whether an order shall be made for the wife's costs, regard must of course be had to the specific facts of each petition.

In the present case the solicitor and his London agent have been examined and cross-examined before me. I am fully satisfied that they both acted bona fide. It is a striking feature of the matter that in giving evidence the country solicitor stated that he has always believed and still believes in the innocence of the wife. I accept his statement of belief, although I myself have no doubt that adultery was committed by the wife as alleged. Both the country solicitor and his agent were unaware of the confession made by the wife when the petition was served upon her.

I am equally satisfied that the solicitor and his London agent acted with proper care and propriety throughout. From the first the wife and co-respondent denied the charge to him, and it was only just before the hearing that matters arose which called for consideration, and which led Mr. Bucknill in the exercise of his discretion as counsel to decide that the wife should not be put into the witness box.

I hold that it is my duty in this case to make the usual order for the wife's costs, and I make it.

Solicitors for petitioner: *Reynolds & Son.*

Solicitors for respondent and co-respondent: *Kenneth Brown, Baker, Baker & Co., for W. H. Sloman, Plymouth.*

J. R. B.

DIVORCE.

1921
July 11.

BEETON *v.* BEETON AND ROBERTSON.

Divorce—Practice—Costs of guilty Wife—Husband's Petition for Divorce—Security for Wife's Costs paid into Court—Decree nisi made at Hearing—No Application as to Wife's Costs at Hearing or before Decree Absolute—Application after Decree Absolute for Taxation of Wife's Costs and Payment out of Court refused.

When money is paid into Court by a husband petitioner as security for the wife's costs and no order as to her costs is made at the hearing, no application can be made after decree absolute for the taxation of the wife's costs or their payment out of the fund in Court.

Husband's petition for divorce on the ground of adultery.

Respondent and co-respondent both filed answers simply denying adultery. Both gave evidence on commission denying adultery and left England some time before the hearing. In July, 1920, the usual order was made for payment of the wife's taxed costs to date and payment of 30*l.* into Court as security. This order was obeyed. On July 26, 1920, the case came on for hearing. The same counsel appeared for the respondent and co-respondent. A decree nisi was made with 300*l.* damages and costs against the co-respondent. No application as to the wife's costs was made at the hearing. The decree was made absolute in January, 1921. On May 4, 1921, the wife's solicitors applied for the taxation of her costs. The registrar objected that there was no order under which they could tax. On May 31 the respondent's solicitors then took out a summons asking that the costs of the hearing might be allowed and paid up to the amount in Court. Sir Henry Duke P. dismissed the summons, but gave leave to renew the application by motion.

The motion now came on for hearing.

W. O. Willis for the motion. The husband is bound to pay the costs of his wife's defence: *Robertson* v. *Robertson*. (1) That has been recognized by the order to secure them. It was a mere oversight that an order was not asked for at the

(1) (1881) 6 P. D. 119.

1921

BEETON v. BEETON AND ROBERTSON.

hearing when it would have been made as a matter of course, and the solicitors could not have been refused them unless they had been guilty of misconduct: *Flower* v. *Flower*. (1)

J. H. Watts for the petitioner. The details of the bill show that the respondent never intended to defend the suit. In any case after the decree absolute the application is too late: *Wait* v. *Wait and Flower*. (2)

SIR HENRY DUKE P. [after stating the facts proceeded:] Under ordinary circumstances, and in the absence of any exceptional facts which threw doubt upon the good faith of the solicitors conducting the wife's defence, the normal course would have been that at the hearing application should have been made for the wife's costs, and, assuming that special grounds were not found to exist, an order probably would have been made that the wife should have her costs up to the amount of security in Court, and that those costs should be added to the costs to be paid by the co-respondent to the petitioner. The foundation on which the jurisdiction and practice of the Court with regard to the wife's costs rests has been often justified, and it is not necessary to go into that matter now. It depends on the relation of husband and wife; and in the vast majority of cases in this country, unless provision were made by an order of the Court for the wife's costs, there would be no means for the presentation to the Court of her defence. For that reason the Court makes orders by which the wife is put into a position to defend herself; and it has often been said that those orders are made for the protection of the solicitor as well as for the advantage of the litigant wife.

In this case at the trial the wife was not present, but her counsel was present, and he also appeared for the co-respondent. No great credit would under the circumstances attach to any act or statement of the respondent. The suit was heard with the help of a common jury; the common jury came to the conclusion that the respondent and co-respondent had committed adultery, and thereupon

(1) (1873) L. R. 3 P. & M. 132. (2) (1871) L. R. 2 P. & M. 228.

1921

BEETON v. BEETON AND ROBERTSON.

The President.

an order was made at the instance of the petitioner for 300*l.* damages and costs against the co-respondent, and nothing more was said. There the matter stands, and stood down to the time of the application in the registry for taxation of the wife's costs against the husband. I can well believe that the proceeding was taken as a matter of course, and it was something of a surprise to the applicant to find that there was no order which warranted taxation ; but the result of what had taken place at the trial was that the registrar was not in a position of his own motion to tax these costs. Thereupon application was made by counsel, acting under a retainer, as it appears, from the respondent, to me in chambers by summons for taxation of these costs. I had no doubt that the order sought was not an order which could be properly made as a matter of common procedure on a summons in chambers, and if it could be made at all, must be made as an extraordinary order upon motion. Accordingly this motion is now made. It is said that during the pendency of the suit the solicitors in good faith conducted various proceedings in the action, intending that they should be for the benefit of the wife, and relying upon the security in Court, and that although, through an accident no doubt, no application was made for payment of these costs at the hearing, nevertheless the Court has power now, under its general jurisdiction, to deal with the costs of divorce proceedings, to make such an order as is sought in this case. Mr. Watts pointed out, in answer to that allegation of jurisdiction, that in the case of *Wait* v. *Wait and Flower* (1), which came before Lord Penzance early in the history of the Divorce Act, it was held that no order for costs could be made after a decree absolute. Under normal circumstances I cannot conceive that a judge would think it just to award payment of costs in the absence of all the parties whose interests ought to be dealt with in the order when payment of costs was decreed, and the impossibility of service upon the co-respondent of these new proceedings seems to me a very substantial reason in point of justice, and of discretion, why an order should not be made here. But I

(1) L. R. 2 P. & M. 228.

1921

BEETON v. BEETON AND ROBERTSON.

The President.

do not found myself upon the decision of Lord Penzance in *Wait* v. *Wait and Flower*. (1) That decision proceeded upon a clause in the statute (Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the terms of which have been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), and replaced by the provisions of the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5. I am satisfied that it would be an improper thing that I should review the decree in the interests of the solicitors as against the petitioner and between the petitioner and the respondent, and I do not propose to review it.

The result is that the solicitors take no benefit by this motion. I have to consider what ought to be done with regard to the costs of the motion. It is clear that the respondent is made a party to these proceedings after she has ceased to be a party to the cause. The combined interest of herself and her solicitors is made the ground of the application. But a long while before the case came on for trial the respondent had gone away to the United States of America. The result is that it is perfectly clear here that this is not an application made either on the direct instructions of the respondent or primarily for the advantage of the respondent; it is the solicitors' application for their own benefit. They have sought this benefit, but have failed to secure it. They must therefore bear the burden. I see no alternative but to direct that the costs of the summons and the costs of the motion shall be paid by the solicitors. The 30*l.* in Court must be paid out to the petitioner.

Solicitor for petitioner: *Arthur Rutherford.*

Solicitors for respondent and co-respondent: *Mackrell, Maton, Godlee & Quincey.*

(1) L. R. 2 P. & M. 228.

J. R. B.

DIVORCE. 1921
July 18, 29.

RUTTER *v.* RUTTER (No. 2).

Divorce—Practice—Rescission of Decree Nisi—Right of Party in whose Favour Decree was made to rescind—Application of guilty Party to make Decree absolute.

Husband's petition for divorce dismissed and decree nisi granted to wife on cross charges in her answer. Wife, a minor without guardian, filed petition for maintenance. Husband took out a summons to dismiss petition for maintenance, and that the costs already paid to wife might be paid into Court until decree made absolute. The wife moved to rescind the decree nisi :—

Held, that the husband being the guilty party could have no relief. The wife's motion was dismissed, with an intimation that if renewed it must be by a guardian.

The Court has power in a proper case to rescind a decree nisi on application of the party who obtained it.

In this case the parties were married on April 20, 1918. The certificate stated that the husband was then twenty-two and the wife eighteen. As a fact the husband was then nineteen and the wife one day short of fifteen.

On August 5, 1919, the husband by his guardian presented a petition for divorce, alleging that the wife had committed adultery and communicated disease to him. On November 7, 1919, the respondent filed an answer denying adultery ; stating that her husband had committed adultery and communicated disease to her, and asking for dismissal of the husband's petition and dissolution of the marriage on her answer.

The case was heard before Horridge J. on May 12, 1920, and he dismissed the husband's petition and granted the wife a decree nisi. After this decree the wife filed a petition for maintenance ; inquiries were directed, but no order had been made. On June 1, 1921, the husband took out a summons for dismissal of the petition for maintenance, and that the costs paid to the wife might be brought into Court until the decree was made absolute. On July 6, 1921, the wife gave notice of motion that the decree nisi should be rescinded and her original petition dismissed. She swore an affidavit that

1921

RUTTER v. RUTTER (No. 2).

she desired to return to her husband. The husband resisted the motion and applied to have the decree made absolute.

On July 18, 1921, the husband's summons and the wife's motion came on together. The husband, who had now attained twenty-one, had sworn an affidavit that the respondent had for months been bringing pressure upon his father and himself to settle a lump sum upon her as a condition of her having the decree made absolute; that his total income was 228*l.* a year, and this litigation had exhausted all his savings.

Noel Middleton for the respondent's motion. The Court has no power to make the decree absolute on the application of the guilty party. It had at one time been doubted whether the Court had power to rescind a decree nisi on the application of the petitioner: *Lewis* v. *Lewis.* (1) But in *Ousey* v. *Ousey and Atkinson* (2) Sir James Hannen decided that the Court had the power. The husband's remedy is to apply to have the decree nisi rescinded for want of prosecution; he cannot have the petition for maintenance dismissed or the decree made absolute.

[He also referred to *Halfen otherwise Boddington* v. *Boddington* (3); *A. otherwise B.* v. *A.* (4); *Parsons* v. *Parsons* (5); *Quartermaine* v. *Quartermaine and Glenister* (6); *Lewis* v. *Lewis.* (7)]

The husband appeared in person.

Cur. adv. vult.

July 29. SIR HENRY DUKE P. [after stating the facts, continued:] The wife asked that the decree nisi which she has obtained may be rescinded, and that application is vigorously opposed by the husband, who asks that the decree may be made absolute. It is a rule in this division, founded on practice, that a guilty party cannot claim relief. That rule disposes of the husband's application to have the decree

(1) (1861) 2 Sw. & Tr. 394.
(2) (1875) 1 P. D. 56.
(3) (1881) 6 P. D. 13.
(4) [1901] P. 284.
(5) [1907] P. 331.
(6) [1911] P. 180.
(7) [1892] P. 212.

nisi made in favour of his wife made absolute. That application cannot and ought not to be allowed.

The wife's application is a more difficult matter. It is made by a girl now only eighteen years old who has been an actor in a disastrous series of events. It is a grave matter, and all the more grave because the wife is not proceeding by a guardian. I have to consider the powers of making absolute decrees nisi, and to inquire to what extent it is open to a suitor who has obtained a decree nisi to discard, and ask for the dismissal of, that decree. According to the practice of this Court the parties are not domini litis, and have not the same power of dealing with proceedings at their will as they have in other Courts. The proceedings are in the discretion of the Court. In *Lewis* v. *Lewis* (1) Sir Cresswell Cresswell expressed a doubt whether the Court had the power to rescind a decree nisi, but with the consent of both parties stayed proceedings; but in *Ousey* v. *Ousey and Atkinson* (2) Sir James Hannen expressed an opinion that the Court had a wider power of rescinding a decree. And as the Court has now under the Judicature Acts the large powers of the High Court of Justice, I have no doubt that the Court has power to rescind the order and dismiss the petition contained in the wife's answer.

Now I doubt whether a girl of eighteen is capable of coming to a wise decision in the matter. Further, on the dismissal of the husband's petition a bill of costs was incurred by him of from 400*l.* to 500*l.*, and that may be an element to be considered. When the decree nisi was pronounced the wife took proceedings for maintenance. Inquiries as to the husband's means were commenced but not completed. It was on an application to dismiss the wife's petition for maintenance in order to dispose of the husband's costs thereon, that the matter first came before me on summons.

Then this motion was made on behalf of the wife. On this motion the wife swore in her affidavit that the ground of her application was her desire for a reconciliation with her husband. The husband's affidavit put a different complexion

(1) 2 Sw. & Tr. 394. (2) 1 P. D. 56.

1921

RUTTER v. RUTTER (No. 2).

The President.

on the matter, for it averred that her application was used as a lever to extract a payment of money from him. That affidavit was not answered.

The wife having been vindicated was entitled to the rights of a wife, and the husband was in the position of a guilty husband. If I rescinded the decree, the wife might at once bring a suit for restitution of conjugal rights, and an order would have to be made against the husband for the provision of her costs. Great care is needed in proceedings of the Court where in normal circumstances the husband has to bear the costs of proceedings taken by the wife.

Looking at the various facts, I am not satisfied that justice would be done if I exercised my discretion in the wife's favour. I am not satisfied that a girl of eighteen would come to proper conclusions in such a matter, nor indeed that this girl has come to any conclusions in the matter. I am not satisfied that the real purpose of the application was to obtain a return to cohabitation; I very much doubt whether either of the parties desired anything of the kind. I propose therefore to make no order on the wife's motion. I am satisfied however that I have power to make such an order if the circumstances of the case warranted it. But if the wife applies again she must apply by her guardian, who will at any rate be responsible for costs.

Noel Middleton. I ask for the wife's costs of her present application.

SIR HENRY DUKE P. If an application for these costs is made, it must be made on a separate application and by her guardian.

Solicitors for the wife: *Beardall & Co.*

Solicitors for the husband: *Ellis, Munday & Clarke.*

J. R. B.

Applied. HADLUM *v.* HADLUM. [1948] 2 All E.R. 412.

Considered. HADLUM *v.* HADLUM. [1949] P. 197

DIVORCE.

Considered. M—T. *v.* M—T. [1949] P. 331

GASKILL *v.* GASKILL.

1921
April 22;
July 19, 29.

Divorce—Period of Gestation—Birth 331 *Days after last possible Connection.*

Considered. PRESTON-JONES *v.* PRESTON-JONES [1951] A. C. 391

This was a husband's petition for divorce on the ground of his wife's adultery. The husband had left his wife on October 4, 1918, and sailed from England on October 12. He did not return until December, 1919. On September 1, 1919, his wife gave birth to a child. There was no evidence against the wife except the lapse of time between coition and the birth of the child (331 days). Evidence was given by three leading medical authorities on the subject that such an interval could not in the present state of medical knowledge be said to be impossible. The petition was dismissed.

HUSBAND'S petition for divorce on the ground of his wife's adultery.

The parties were married on August 17, 1918. The petitioner was then in the Royal Engineers, who were in camp near Aldershot. He had leave of absence from September 29, 1918, to October 3, 1918, which he spent with his wife, who was living with her parents at Westcliff-on-Sea. He overstayed his leave one day; and had sexual intercourse with his wife on October 4, 1918. On the same day he rejoined his unit, started for Salonica on October 12, 1918, without seeing his wife again, and returned to this country in December, 1919.

The wife gave birth to a child on September 1, 1919. On his return to England, the husband, having been told of the birth, refused to return to his wife, and on March 15, 1920, filed a petition for divorce on the ground of adultery. The wife put in an answer denying the adultery and stating that the husband was the father of the child.

On June 7, 1920, the husband got leave to proceed without naming a co-respondent.

At the hearing no evidence was adduced which reflected in any way on the conduct of the respondent during her husband's absence, and the claim for relief was based solely on the impossibility of the husband being the father, owing to the period (331 days) between the last intercourse and

1921

GASKILL v. GASKILL.

the birth. The wife gave evidence that a menstrual period occurred in October or November, 1918, after the departure of her husband.

The case was heard before the Lord Chancellor on April 22, 1921.

T. J. O'Connor for the petitioner.

H. W. Barnard and *Skinner* for the respondent.

Dr. Munro, who attended the respondent on her confinement, gave evidence that the child was above normal size and weight, and the head so far above normal as to make labour prolonged and difficult. He estimated the weight of the child to be 10 lbs., but did not weigh it. He also mentioned that he had since been told by the respondent that she had menstrual periods of five weeks, and stated that there was a theory that the normal period of gestation was ten menstrual periods. If that was correct the length of gestation was accounted for.

Medical evidence was given on the other side that the alleged length of gestation exceeded all known records and was impossible.

The Lord Chancellor adjourned the hearing, and requested the Attorney-General to attend as amicus curiæ, and call the best specialist evidence which could be procured.

On July 19, 1921, *Sir Gordon Hewart A.-G.* appeared with *Cotes-Preedy*, and called three specialists, stated to be amongst the greatest living English authorities on the subject. The following summary of their evidence is taken, with some condensation, from the Lord Chancellor's judgment.

Professor Henry Briggs (Professor of Obstetrics and Gynæcology in Liverpool University, President of the Obstetrical and Gynæcological Section of the Royal Society of Medicine, and member of the Central Midwives Board) stated that he had known one instance of gestation prolonged for 306 days from the last cessation of menstruation; he had not personally met with prolonged gestation from a

single congress. In his opinion fœtal oversize had not been proved to be a constant feature of prolonged gestation; and he did not therefore regard the physical characteristics of the child in question as of supreme importance. In his view, though prolongation of gestation for 331 days was improbable, it was not within the range of present scientific knowledge to allege that it was impossible. He stated his reasons to be, that the actual date of conception, that is of the fusion of the cells, cannot be ascertained by any available means at present known to science. In obstetrical practice the commencement of pregnancy is usually reckoned with reference to the menstruation date, but sometimes with reference to the date of insemination. This reckoning is very uncertain. Between the time of fruitful coition and the time of conception there is an interval, the length of which cannot be determined. He was, therefore, unable to say that the pregnancy could not be prolonged till September 1, 1919. If, however, the blood loss deposed to as having occurred in October or November, 1918, was a normally recurring menstruation (as to which he could not express any opinion) then, in his judgment, the birth could not be assigned to the coitus of October 4, 1918.

Dr. Fairbairn (who had been long engaged in consulting practice as an obstetric physician and held important appointments in midwifery) agreed with the last witness that a considerable delay may occur between coition and the union of the male and female cells, and cited authorities to show that spermatozoa may be found alive in the female genital tract for three weeks after coitus, but the extreme limit of time for such survival is still unknown. There was a general agreement that the mean duration of pregnancy, calculated from the cessation of the last menstrual period, is from 275 to 280 days, from the coitus, 265 to 275 days. But having regard to the above fact it was impossible to say what period does in fact elapse between fertilisation and commencement of labour, or whether that period is constant or varies with the individual woman.

He definitely rejected the theory, mentioned by Dr. Munro,

1921

GASKILL v. GASKILL.

that pregnancy lasts for ten menstrual cycles, on the ground that many investigations have made its fallacy obvious. He admitted a possibility that a long menstrual period might affect the duration of pregnancy in cases where that length entailed less frequent ovulation, but that was a theory which cannot be definitely proved.

He also dealt with the question of menstruation during pregnancy. In his opinion two, or even three, discharges are not inconsistent with pregnancy. But such later hemorrhage as is not uncommonly met with after the third month must be assigned to some other cause. But apart from the fact that such hemorrhage does occur after pregnancy, and whether it is a true menstrual discharge or not, is commonly so regarded by the patient, the point was, he thought, of little importance in this case.

The facts which he regarded as important included the life of the placenta. Placental functions, he said, usually come to an end about the ninth month, and in such a case if the child is not born immediately it dies "in utero." But there are cases in which it continues to function with the result that the child is more developed at birth than usual. Normally he should expect the child to be more developed where birth was delayed; but there were cases of over-developed children without prolonged gestation; so the latter could not be the only cause. There would, however, be more advanced ossification, and the resultant greater firmness and rigidity of the skull and body might cause difficulty in labour.

The actual number of cases in which pregnancy calculated from coitus is prolonged for more than four weeks over the normal period was, in his opinion, so small that a physician with large hospital practice might never meet with one, and no one individual was likely to meet with more than one or two undoubted cases. Recourse therefore must be had to reports. He had not personally met with many cases of protracted gestation, but when the period was more than two or three weeks over the normal it was accompanied by special and unusual features in the labour or the child. The

longest case in his own experience was 315 days from menstruation. Labour lasted two days and the child was ultimately delivered by the Cæsarian operation. It was 22½ inches long, and weighed 11 lbs. In that case he accepted his patient's statements as accurate. In another case labour was induced after 296 days; the child was 23 inches long, and weighed 10¾ lbs. The patient's two previous confinements had been, the first 308 days after menstruation, and on the second, labour was induced at 266 days, but in both cases the child was beyond the normal length and weight.

He cited the following cases from works by well-known authorities. Sir James Simpson reported four cases where the periods after menstruation were respectively 336, 332, 319 and 324 days. Dr. Playfair in his Science and Practice of Midwifery mentioned cases where labour began at the calculated date, but was arrested and delivery delayed, in no case however till 304 days had elapsed since menstruation. The great difficulty with reported cases was that the liability to error is so great that the strict proof which is essential is rarely forthcoming. He accepted, however, a case reported by Thompson in vol. xxvii. of the Obstetrical Society's Transactions, in which pregnancy lasted 317 days from menstruation and 301 from coitus. He also referred to one reported case where pregnancy lasted a year from the last menstrual period, but gave reasons for doubting the sufficiency of the evidence. He placed great reliance on the report of Von Winckel, published in the Klinische Vorträge for January, 1901, p. 143, where the conclusions arrived at, after considering some 30,500 cases, were that children of abnormal size formed about 3.15 per cent. of the total number of births, and that of these 14.5 per cent. were over 302 days in utero. Calculating from menstruation the shortest period for such heavy children was 240 days, the longest 336. Von Winckel concluded with the details of eleven cases of prolonged pregnancy which he accepted as correct. The longest was 336 days from the last menstruation, and 315 from coitus. The child's weight was 12¾ lbs.

Dr. Fairbairn also cited Dr. Ellerman of Copenhagen

1921

GASKILL v. GASKILL.

and Professor Allen of Maryland University on the relation of protracted gestation to over-development of the child.

His considered opinion, based on the known scientific data as well as his own experience, was that considerable protraction of gestation may occur, extending to 331 or 332 days from coitus; but in such a case some effect on the child of so extreme a prolongation would be expected. He would reject the occurrence of 331 days' gestation unless there were plainly written on the body of the child the signs of very long pregnancy.

Dr. Thomas Watts Eden (who is also an eminent consultant) gave 305, 300 and 298 days from the last menstruation as the longest periods in his own experience. The children were all large, about 5 per cent. above the normal weight of 7 lbs. In his opinion the methods of calculation adopted were necessarily inexact. To reckon from coitus is possible only in a restricted number of cases, and even then an error of as much as 21 days, or even more, is possible (for this he gave the same reasons as Dr. Fairbairn had done). To reckon from the last menstruation may itself be to admit error, for conception may occur at any time during the inter-menstrual period following, and this period may be indefinitely increased where, as sometimes happens, menstruation ceases for some cause other than pregnancy, and the inter-menstrual period is consequently extended. These errors tend to ante-date conception and therefore to make the duration of pregnancy seem longer than it really is.

But when allowance is made for such errors, there was, in his opinion, reason to believe that the actual period of gestation is variable, and is not necessarily the same for all women or in successive pregnancies of the same woman. He referred to certain statistics of forty cases of pregnancy after a single coitus, the shortest being 260 and the longest 294 days. This difference was, in his opinion, too great to be accounted for by errors of the kind above referred to. It was not, in his opinion, very uncommon for gestation to last more than 300 days. He accepted as authentic four reported instances of pregnancy lasting beyond 320 days,

—namely (1.) 323 days where the child weighed 12½ lbs.: Taussig, American Journal of Obstetrics, 1901; (2.) 324 days, where the child weighed 14 lbs. (the case above referred to by Dr. Fairbairn); (3.) 331 days, where the child weighed 13¼ lbs.: Von Winckel, p. 75; and (4.) 336 days, where the child weighed 16¼ lbs.: Bensinger, Central-Blatt für Gynäkologie, 1903, p. 816.

In his view in such cases the weight of the child would be above the average weight of children at birth, making allowance for the limit of error required by the method of calculation.

He agreed with Dr. Fairbairn in rejecting the theory of ten menstrual periods.

Cur. adv. vult.

July 29. VISCOUNT BIRKENHEAD L.C. [after stating the facts of the case, and the medical evidence as above, continued:] Nothing is known to the petitioner and nothing has been brought forward by him which reflects upon the conduct of the respondent. An allegation of adultery is a serious allegation which must be strictly proved; and I was struck by the fact that the petitioner was unable to associate his wife with any lover or even with any act of indiscretion. No evidence of adultery, proper even to be considered, has been adduced by the petitioner. The position, therefore, remains exactly as it was at the conclusion of the evidence at the original hearing—namely, that the petitioner asks the Court to give him a decree upon an inference, which he maintains is irresistible, that it is impossible that so long a period as 331 days should intervene between coition and parturition.

As a minor circumstance I have to consider what inference, if any, ought to be drawn from the fact that the respondent apparently underwent a menstrual period either in October or November, 1918.

As it was obvious that any decision reached upon the matter must be of general importance, I adjourned the case so that an opportunity could be given to produce further material for consideration. In so doing I did not reflect upon the

1921

GASKILL v. GASKILL.

Viscount Birkenhead L.C.

competence of the medical gentlemen who gave evidence at the hearing; but the point is of such importance that it was proper that the Court should receive the most specialised medical advice available. Having regard to the humble position in life of the parties, I directed the attention of the Attorney-General to this case, and thus have had the opportunity of hearing argument on the legal authorities, and of hearing the views of medical men with special reputation in such cases.

Four cases were cited by the Attorney-General. In the *Gardner Peerage Case* (1) the interval was 312 days. A large body of evidence, medical and lay, was called upon the point of duration; but other evidence was given of conduct from which adultery could be inferred, and it is clear that the Committee acted not only on the expert evidence, but on the evidence of the woman's conduct, in coming to the conclusion that the child was illegitimate.

In *Bosvile* v. *Attorney-General* (2) the lapse of time was not sufficient of itself to negative the possibility of the husband being the father; there was other evidence as to the conduct of the woman, and the issue was whether there was evidence to justify the jury in finding that the child was illegitimate. They had so found and the Court refused to set their verdict aside.

Burnaby v. *Baillie* (3) was a case similar to but somewhat stronger than *Bosvile* v. *Attorney-General* (2), and North J., after considering, not merely the medical evidence, but evidence as to the relations between the wife and another man during the period to which the birth could refer, decided against legitimacy.

These three cases all turned on the question whether the evidence as to the wife's conduct was such that the Court was justified in holding that the presumption of legitimacy had been rebutted. The length of the particular pregnancy was not the sole material factor; it was only one of a number of relevant considerations all tending to disprove legitimacy.

(1) (1824) Le Marchant's Report of this case.

(2) (1887) 12 P. D. 177.

(3) (1889) 42 Ch. D. 282.

In *Bowden* v. *Bowden* (1) there was no evidence of adultery apart from the length of pregnancy. The length of the period was 307 days. The evidence there given was that the average period was 275 days, the normal period 273 to 280 days; but instances were given of 306 and 309 days. Upon this evidence Horridge J. held that the child was legitimate.

I have no doubt that the principles on which I should act in coming to a conclusion of fact upon the evidence in this case are laid down in *Morris* v. *Davies* (2), where Lord Lyndhurst L.C., sitting as a judge of first instance, cited with approval the opinion of the judges in the *Banbury Peerage Case* (3): "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child." Lord Lyndhurst goes on to point out that all that the case of *Head* v. *Head* (4) decided was that the Court must be satisfied that sexual intercourse did not take place "not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury, to whom that question is submitted." On the appeal his decision was affirmed. Lord Lyndhurst again stated his opinion (5): "that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." I need only mention that Lord Lyndhurst referred to a sentence of divorce pronounced in accordance with the law as it then existed, and the rule he

(1) (1917) 62 Sol. J. 105.
(2) (1837) 5 Cl. & F. 163, 215.
(3) Le Marchant's *Gardner's Case*, App. 437–439.
(4) (1823) 1 S. & S. 150; T. & R. 138.
(5) 5 Cl. & F. 265.

1921

GASKILL v. GASKILL.

Viscount Birkenhead L.C.

stated must be modified to accord with the present state of the law; but no point arises here on that aspect of his judgment. It is true that the observations were made in reference to a legitimacy suit, but I cannot conceive that in the present case any different principle can apply; otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband.

In this case the only evidence of adultery is the admittedly abnormal length of pregnancy. No other fact or circumstance has been adduced which in the slightest degree casts any reflection upon the chastity or modesty of the respondent, who has on oath denied the alleged adultery. I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the respondent, and find that she has not committed adultery, and accordingly I dismiss the petition.

I add a concluding observation, though I cannot tell whether it will be useful. The petitioner in this case—a most unusual one—conceived a natural anxiety as to the integrity of the respondent. My decision and the medical opinion on which it is based may have reassured him on this point. The respondent, on the other hand, ought not to resent the attitude which her husband adopted. Both have been the sport of Nature; both are still young. They were happy together until this suspicion arose. Now that is dissipated, they should at least consider whether they cannot recapture that which they lost.

Solicitors for petitioner: *Waller & Mager.*
Solicitors for respondent: *McMullen, Bradford & Bennett.*
The King's Proctor.

J. R. B.

DIVORCE.

1921
July 11.

BARCROFT *v.* BARCROFT.

Divorce—Practice—Restitution of Conjugal Rights—Summons by Respondent to stay Proceedings—Divorce Rule 176.

The practice of staying proceedings for restitution under Divorce Rule 176 on a summons by the respondent is suitable only where the case ought not to be allowed to proceed in the usual course. It ought not to be adopted in cases where the Court is satisfied that there is an issue fit to be tried whether the respondent has deserted the petitioner, or whether the petitioner has been guilty of misconduct which should deprive him or her of the right to trial.

WIFE'S petition for restitution of conjugal rights.

The petition was filed on November 26, 1920. On May 18, 1921, the respondent took out a summons under Divorce Rule 176 (1) to stay proceedings. The summons was adjourned to the judge, and heard in chambers by Sir Henry Duke P. on May 30, 1921, when an affidavit by the husband and certain correspondence was read in which the husband had asked the wife to return. The President adjourned the summons for three weeks, and the hearing for four, to enable the respondent to find a home for the petitioner. After further adjournments due to the state of business the summons came on again before the President on July 4, when further evidence was read, which showed that the parties were not agreed, the husband alleging that the wife would not return, and the wife that he was not in earnest in asking her, and had made no attempt to provide a home. The President proposed to dismiss the summons, but at the husband's request he adjourned it into Court for argument with a view to an appeal. At the same time he gave leave to the husband to file an answer. He filed an answer denying that he had deserted his wife, alleging that she had left him and was not

(1) Divorce Rule 176 (added March, 1869): "At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply by summons to the judge, or to the registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner."

1921

BARCROFT v. BARCROFT

sincere in her demand for cohabitation; and that he being a soldier on active service had maintained as much cohabitation as his duty permitted. The summons now came on in Court.

R. M. Middleton for the summons. On the facts shown in the correspondence and evidence I contend that the respondent made all reasonable efforts to cohabit, having regard to his calling: *Williams* v. *Williams*. (1) The suit should be stayed, because a decree for restitution would be equivalent to finding the respondent guilty of desertion without reasonable cause, contrary to the truth of the case: *Russell* v. *Russell*. (2) He also referred to *Williams* v. *Williams* (3) and *Walter* v. *Walter*. (4)

Durley Grazebrook for the petitioner. The evidence clearly shows that the respondent is not acting bona fide in asking his wife to return. The proceedings, therefore, ought not to be stayed in the case.

SIR HENRY DUKE P. [after reading Divorce Rule 176:] That is a salutary rule framed to enable parties to bring to a summary close proceedings for restitution which ought not to be allowed to take their usual course. The present application illustrates a mode of resort to the rule too frequently adopted of late, as a step in the controversy between the parties with a view to deprive the petitioner of the right to have the suit tried. I stated in chambers that I was not satisfied that the present case came within the rule, but as the respondent desired an opportunity of taking the opinion of the Court of Appeal upon my decision, I adjourned the summons into Court for argument. The matter is of importance with regard to the procedure in restitution suits, and I will therefore state the grounds on which I think the application ought not to succeed.

In 1920 the wife presented a petition for restitution of conjugal rights, alleging that since the year 1919 the husband

(1) (1864) 3 Sw. & Tr. 547.
(2) [1895] P. 315.
(3) [1921] P. 131.
(4) [1921] P. 302.

had withdrawn from cohabitation with her. The petition was supported by affidavit as required by rule, and the affidavit sets out a letter addressed by the wife to the husband in 1920, containing an appeal of a most affecting kind, unless the wife is proved to be an accomplished hypocrite, to the husband to return to her. It was an appeal directed to an officer in His Majesty's service by his wife, the mother of his children, against whom there were no grounds of imputation. But to that letter, as the affidavit states, there was no reply. The wife's suit proceeded; no answer was filed, and on January 24 last it was set down for hearing as an undefended suit. In May the suit was ready for hearing, and about to come into the list, when the husband, having changed his solicitors, issued a summons to stay the proceedings on the ground that he was ready and willing to resume cohabitation with his wife At the hearing he professed, through his counsel, that readiness, and as it was desirable, if he were sincere, that facilities should be given to him to do what he proposed to do, I adjourned the summons for three weeks to enable cohabitation to be resumed. The husband spent that three weeks in writing letters to his wife, explaining why he could not make a home for her. I do not decide at this time whether those were sincere letters, I leave that matter open for the hearing. But the result of that correspondence is to satisfy me that the petitioner has a cause fit to be tried, and has been guilty of no conduct which should deprive her of the right of every subject to resort to His Majesty's Courts of Justice. The issues raised by the husband's affidavit are fit to be decided at the trial, and are not such as to divest the wife of the right to have her case heard. I regard this application as an attempt to prevent the trial, an attempt which ought not to succeed, and I dismiss the application with costs to be taxed and paid. The case will come on for trial in the usual course.

R. M. Middleton. Will your Lordship give me leave to appeal?

SIR HENRY DUKE P. You must make your election

1921

BARCROFT v. BARCROFT.

either to file an answer and to defend the suit, or to appeal from my decision. I shall not stay the proceedings to facilitate an appeal from what is in my view a pure matter of discretion.

R. M. Middleton. I will elect to defend the suit. The husband has already filed an answer.

Solicitors for petitioner: *Lumley & Lumley.*
Solicitors for respondent: *Torr & Co.*

J. R. B.

C. A.
1921
July 15.

[IN THE COURT OF APPEAL.]

FOSTER *v.* FOSTER.

Divorce—Wife's Petition—Cruelty—Husband suffering from venereal Disease—Intercourse against Wife's Wishes—Non-communication of Disease—Reasonable Apprehension of Danger to Health.

A successful attempt by a husband, who knows that he is suffering from venereal disease, to have connection, against her will, with his wife, who also knows that he is so suffering, may, in some circumstances, be legal cruelty, although in fact the disease is not communicated.

Decision of Horridge J. reversed.

Ciocci v. *Ciocci* (1853) 1 Spinks, 121 overruled.

APPEAL from a decision of Horridge J.

In this case the wife petitioned for dissolution on the ground of her husband's cruelty and adultery. The alleged cruelty was that the husband, knowing that he was infected with venereal disease, succeeded, against the will of the petitioner, who knew that he was so infected, in having sexual intercourse with her. The disease was not communicated, and the question was whether the husband was guilty of legal cruelty. It appeared that the petitioner had for many months refused to have intercourse with her husband on the ground of his infection with the disease, but her evidence was that on the occasion alleged—namely, on January 5, 1912—he "took advantage of her" against her will. She had obtained a

separation order on the ground of desertion, but the present petition was not presented until Nov. 1, 1919.

Horridge J. held, on the authorities, that no legal cruelty had been established and dismissed the petition.

The petitioner appealed.

Sir W. Geary for the appellant. The question is whether a husband who, knowing that he is infected with venereal disease, insists, against the will of his wife, who also knows of his condition, in having marital intercourse with her, is guilty of legal cruelty. It is submitted that he is: *Popkin* v. *Popkin* (1), a decision of Lord Stowell.

[LORD STERNDALE M.R. That was not a simple case of attempting to have connection when infected, but it was attempting in an outrageous and violent manner, which, of itself, would have been cruelty.]

Horridge J. felt himself bound by the opinion of Dr. Lushington in *Ciocci* v. *Ciocci* (2), who said there could be no cruelty unless the disease was actually communicated.

[ATKIN L.J. referred to the editor's note in that case. (3)]

In *Reg.* v. *Clarence* (4) different considerations arose.

The test laid down by Lord Herschell is whether there is danger to life or limb or health, or reasonable apprehension of it: *Russell* v. *Russell.* (5) This case comes within that doctrine: *Browning* v. *Browning.* (6)

LORD STERNDALE M.R. I think that, in the state of the authorities, Horridge J. could not have come to any other conclusion than he did, because he had the authority, as long ago as 1853, of a Court of co-ordinate jurisdiction, that legal cruelty cannot be established by an attempt to communicate venereal disease unless the disease is actually communicated. That seems to me to be quite clearly stated, perhaps more widely than was necessary having regard to

(1) (1794) 1 Hagg. Eccl. 765*n*.
(2) 1 Spinks, 121.
(3) Ibid. 132.
(4) (1888) 22 Q. B. D. 23.
(5) [1897] A. C. 395, 457.
(6) [1911] P. 161, 166.

C. A. 1921

FOSTER v. FOSTER.

Lord Sterndale M.R.

the facts of the particular case, but quite clearly stated by Dr. Lushington in *Ciocci* v. *Ciocci*. (1) He says: "I am of opinion that it is essential, to support that charge, that the *corpus delicti* should be proved, and here there is not adequate proof. And if there be not adequate proof of the fact, however great the moral delinquency of consummating a marriage with the probable chance of communicating the venereal infection, I am not prepared to say that so doing constitutes legally an act of cruelty as understood in these Courts. In order to constitute an act of legal cruelty there must be, in my opinion, an actual communication of the disease, and the running the risk is not sufficient." In the face of that statement, made by Dr. Lushington more than sixty years ago, I think Horridge J. could hardly have decided otherwise than he did. It is quite true that *Popkin* v. *Popkin* (2) was cited, and in that case Lord Stowell does seem to have stated that an attempt to have connection with his wife when he was suffering from venereal disease might be, and was, cruelty on the part of the husband; but although Lord Stowell had laid that down, Horridge J. was met by the broad and distinct statement of Dr. Lushington that, in order to have cruelty, you must have an actual communication of the disease. I think that that statement is too broad. It is inconsistent with *Popkin* v. *Popkin* (2), which is certainly an authority, and recognized as such by Horridge J., that in some circumstances an attempt to have connection and so risk the communication of venereal disease is an act of cruelty on the part of the husband. I quite agree with that, and I think, as I say, that what was laid down in *Ciocci* v. *Ciocci* is too broad. In this case we have these facts: the husband knew he had venereal disease, and the wife also knew it. She had abstained from marital intercourse for a considerable time because the husband had venereal disease, and there is evidence that the husband knew that that was the reason she had abstained from marital intercourse. In those circumstances, on January 5, 1912, he did have connection with her. She says it was against her wish. She

(1) 1 Spinks, 121. (2) 1 Hagg. Ecc. 765*n*.

says that he took advantage of her; but the actual circumstances are to my mind left very vague indeed owing to the unfortunate habit people so often have, in dealing with these matters, from I suppose a so-called feeling of delicacy, of using ambiguous and conventional terms instead of speaking plainly and straightforwardly; and for that reason I do not feel myself in a position to say that we should grant the petition and make a decree nisi here. I think that the case must go down to be investigated, because, in my opinion, the actual facts of the matter need more investigation than they have received. There are several circumstances to be investigated: there is the fact that the wife did not leave the husband for a month after the alleged occasion, and there is no evidence of any complaint by her for something like eight or nine years. There is evidence that she obtained a separation order on the ground of desertion, but there is nothing that I can see upon the evidence to show any complaint by her. There may be nothing in the fact that she did not make a complaint, but it is a matter which requires investigation. What she means exactly by "took advantage of me" and by "against my wishes" needs investigation. I think all these matters require investigating; therefore I think the case ought to go down to be reheard, with this direction: that an attempt by a husband, who knows he has a venereal disease, to have connection against her wishes with his wife, who also knows the state in which he is, may in some circumstances be cruelty, although in fact the disease is not communicated. I do not think we can give any more direction than that. The case must go down for rehearing with that direction.

ATKIN L.J. I agree, and I only add a few words because I think this case is one of very great public importance. The definition of cruelty I take from an authoritative judgment of the House of Lords—namely, the judgment of Lord Herschell in *Russell* v. *Russell* (1), where there was a very important dissentient body of opinion in favour of extending

(1) [1897] A. C. 395, 457.

C. A. 1921

FOSTER v. FOSTER.

Atkin L.J.

what was at that time, I think, considered to be the law as to legal cruelty—at any rate giving it a wider scope; therefore I say it is of significance that this passage is a passage in the judgment of the majority, who were inclined to retain the definition of cruelty within narrower limits than that which was proposed by the dissenting law Lords in that case. In the passage to which I refer (1) Lord Herschell is citing from the judgment of Sir Cresswell Cresswell in *Tomkins* v. *Tomkins* (2), which was pronounced in 1858, and what Sir Cresswell Cresswell said was this: "There must, however, be bodily hurt—not trifling or temporary pain; or a reasonable apprehension of bodily hurt. It will be for you to determine whether the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health." Then Lord Herschell says: "This is a clear, and, I apprehend, an accurate statement of the law administered by the Ecclesiastical Courts. It has been suggested that it was not a complete exposition of the law, but merely such a statement as was necessary, having regard to the facts proved in the particular case. I am unable so to regard it." Now, that being the test, it appears to me that, if a husband, knowing that he has venereal disease, insists on having intercourse with his wife, who also knows that he has venereal disease, he is guilty of conduct causing reasonable apprehension of bodily suffering. In that I am assuming that he insists or threatens to have intercourse against his wife's will, and, if he so insists, it appears to me that it is unnecessary to prove actual violence such as, without considering the right to marital intercourse, would amount to an assault. I think it would be sufficient if the husband, who has the right to intercourse, does in fact insist upon it, and makes his wife know that he intends to insist upon it against her will. Upon the facts of this case, it appears that this man had been suffering from venereal disease for a long time, and, in consequence of it, the wife

(1) [1897] A. C. 395, 457. (2) (1858) 1 Sw. & Tr. 168, 172.

had abstained from sleeping with him, or at any rate allowing him intercourse, for a period which she says was a year and eight months; that she had refused, and, in consequence of her refusal, upon a particular occasion, according to her evidence, he took advantage of her and had intercourse with her against her will. I agree that those facts require investigation, and it will be for the judge to determine, upon any fresh evidence that may be brought before him, whether the case comes within the definition which we are laying down. The case will no doubt be reopened and reheard when it goes down for a new trial; and the wife will explain the circumstances, and, in so far as she can obtain corroborative evidence, no doubt it will be admitted. On the other hand, the nature of the occurrence, as between husband and wife, is one that, under ordinary circumstances at any rate, makes it unlikely that the wife would complain unless to some person in a very close and confidential relation with her. The case must go back to be reheard. I quite agree with what has been said by the Master of the Rolls as to the state of the authorities. I think we must be taken to be definitely differing from *Ciocci* v. *Ciocci* (1), which was followed by the learned judge.

YOUNGER L.J. I am of the same opinion, and I desire to make only one observation. This case is not a case merely of an attempt. Here there was actual connection. It appears to me that, in such a case, where knowledge of her husband's malady is possessed by the wife, it is necessary that it should be very plainly shown that the husband's conduct really took place in spite of the wife's unavailing remonstrance, if not resistance.

[Oct. 21, 1921. On this date the petition was reheard by the President, who, on further evidence for the petitioner, made a decree nisi.]

Solicitor for appellant: *William Drake.*

(1) 1 Spinks, 121.

G. A. S.

C. A.
1921
July 8.

[IN THE COURT OF APPEAL.]

THE BRISTOL CITY.

Admiralty—Collision—Limitation of Liability—Privity of Owners—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

An unfinished vessel was sent by the plaintiffs, a firm of shipowners and shipbuilders who built the vessel, from Bristol to Cardiff to have her engines put on board. She had no hawse pipes or windlass, no chain cable, and only one anchor and about 48 fathoms of 4½-inch wire rope. She was sent to Cardiff in tow of two tugs, and the plaintiffs had arranged for her to be brought back to Bristol in tow of two tugs. The second tug did not arrive and the plaintiffs' marine superintendent decided to start with only one tug. The weather was then a moderate gale. After the towage started the weather got worse, the tug's tow rope parted, the one anchor was let go but failed to hold, and the vessel drifted across the bows of a sailing ship at anchor and damaged her.

The plaintiffs sought to limit their liability for the collision under s. 503 of the Merchant Shipping Act, 1894, which provides that where without the actual fault or privity of the shipowners damage is caused to another vessel by reason of the improper navigation of the ship, they shall not be liable to damages beyond an aggregate amount not exceeding 8*l.* for each ton of their ship's tonnage :—

Held, that although the plaintiffs contemplated that the voyage would be made with two tugs, the vessel ought not to have been sent across without hawse pipes or proper ground tackle and that the absence of proper ground tackle was the real cause of the collision ; that as the plaintiffs were shipowners as well as builders they must be taken to have had knowledge as to what constitutes seaworthiness ; that they had not therefore discharged the onus upon them of establishing that the collision happened without their actual fault or privity ; and accordingly, that they were not entitled to a decree of limitation of liability.

Appeal from a judgment of Duke P. in an action of limitation of liability.

The plaintiffs originally on the record were the Bristol City Line of Steamships, Ld., as owners of the steamship *Bristol City*, but, by an amendment made at the hearing before the President, Charles Hill & Sons, Ld., the builders of the vessel, were substituted as plaintiffs. The defendants were the owners of the sailing ship *John Ena* and the owners of her cargo.

The facts, which substantially are taken from the learned President's judgment, shortly stated were as follows :—

C. A. 1921

THE BRISTOL CITY.

On December 4, 1919, the *Bristol City* was an incomplete and unregistered ship. Her tonnage ascertained in accordance with the provisions of the Merchant Shipping Acts was 2627 tons. She had been taken from the builders' yard at Bristol across to Cardiff to have her engines put on board, and she was in the course of being brought back in tow of a tug when she came into collision with the four-masted American ship *John Ena* lying at anchor in Dalton Roads. The owners of the *John Ena* brought an action against "the owners of the *Bristol City*," who admitted liability, and the present action was then instituted by the Bristol City Line of Steamships, Ld., for a declaration limiting their liability under s. 503 of the Merchant Shipping Act, 1894, to 21,018*l.*, being the aggregate amount of their liability at 8*l.* per ton on the tonnage of the *Bristol City*. (1) The defendants, the owners of the *John Ena*, did not traverse the ownership of the plaintiffs, but they specifically denied that the collision occurred without the plaintiffs' actual fault or privity.

In the course of the hearing it appeared that the Bristol City Line of Steamships were not the owners of the *Bristol City* and that she was still owned by the builders, Messrs. Charles Hill & Sons, Ld., and the owners of the *John Ena* did not resist an amendment whereby Charles Hill & Sons, Ld., were substituted as plaintiffs.

It appeared that by reason of strikes and other difficulties the *Bristol City* was not in a condition to be sent to Cardiff as the builders under ordinary circumstances would have proposed to send her. She was sent with no windlass and no hawse pipes. She had one patent anchor attached to 48 fathoms of $4\frac{1}{2}$-inch wire, but no chain cables. She was sent over in tow of two tugs, and when she had got her

(1) By s. 503 of the Merchant Shipping Act, 1894: "the owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity . . . . (*d*) where any loss or damage is caused to any other vessel . . . . by reason of the improper navigation of the ship, be liable to damages beyond . . . . an aggregate amount not exceeding 8*l.* for each ton of their ship's tonnage."

C. A. 1921

THE BRISTOL CITY.

engines on board arrangements were made for her return voyage to Bristol in tow of two tugs.

Captain Barclay, Messrs. Hills' marine superintendent, was in Cardiff and had charge of the arrangements for providing sufficient tugs. One tug did not appear, but he thought he would meet her going out of Cardiff or at any rate not further off than Penarth Roads. He did not meet her, but picked up another tug which assisted to tow the vessel clear of the Port of Cardiff. The weather was not good when Captain Barclay was about to start; but (said the learned President) "taking, as I think and am advised, seamanlike precautions as to weather, he thought as the glass was rising he was justified in setting out. The weather became very much worse; what had been a moderate gale became a whole gale; and then the rope of the one tug that was left parted." Repeated efforts were made to get a rope to the tug without success, and the *Bristol City* drifted towards the vessels anchored in Walton Bay. The anchor was let go but it dragged, and the *Bristol City* drifted across the bows of the *John Ena*.

The learned President said that he thought that if an incomplete vessel was to be towed from Cardiff to Bristol in the month of December, a voyage which although only some eighteen miles involved the risks of a sea voyage, she should have some means of securing herself in case a tow rope parted or the tugs were not able to take charge of her in an emergency. He had consulted the Elder Brethren on the matter and they advised him that ground tackle was a proper and necessary part of the equipment of the vessel for the voyage upon which she was bound, and that it was wholly defective. They further were of opinion that if the ground tackle had been such as ought to have been provided "the odds were 99 to 1 that the collision would never have happened." It followed from that, said his Lordship, that the collision happened by reason of the vessel being sent to sea in an unseaworthy condition in respect of her ground tackle, and the only remaining question was whether that took place without the plaintiffs' default or privity. The

burden of proof was upon the plaintiffs to show that it did. In his Lordship's opinion Mr. Hill, junior, who had not been called, knew quite well how the vessel was sent out and why she was sent out in that condition; and that she was so sent out because as a matter of business management it seemed to be worth while to send her out in that way. The plaintiffs had not satisfied him that the collision occurred without their actual fault or privity, and the action therefore would be dismissed with costs.

The plaintiffs appealed. With the consent of the respondents an affidavit by Mr. Hill, junior, was put in. He stated that the business connected with the *Bristol City's* voyages between Bristol and Cardiff was under his management and supervision, but he was not a mariner and had no knowledge of the handling of vessels. He knew that the hawse pipes of the *City of Bristol* had not been fitted, that she had no windlass, and that she was provided with one heavy anchor of 45 cwts. attached to 48 fathoms of 4½-inch wire rope which was made fast to a bridle consisting of a chain passed between two holes in the bows left for the subsequent construction of her hawse pipes. The equipment was identical to that which had been employed in the case of five other vessels which made similar voyages in similar condition to and from Cardiff. He did not know that when the *Bristol City* was about to leave Cardiff only one tug was in attendance, nor did he know what the weather was, and he did not authorize or approve of Captain Barclay taking the vessel from Cardiff or commencing the voyage as and when he did.

Bateson K.C. and *Noad* for the appellants. A vessel is sufficiently equipped if she has sufficient compensation for anything that is absent. The plaintiffs had contracted for two tugs, and two tugs would have given an ample margin of safety if anything had gone wrong. The vessel would have been more seaworthy with two tugs and no hawse pipes than with one tug and proper hawse pipes, anchors, and chains. Mr. Hill, who was not a seaman, did not know that the vessel was leaving in bad weather and with only one tug;

C. A. 1921

THE BRISTOL CITY.

and the question is whether in sending her equipped as she was he was guilty of default—i.e., was he doing what was unreasonable under the circumstances: cf. *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1) The fault if any one's was that of Captain Barclay; and if the vessel would have been quite safe with two tugs the plaintiffs were not guilty of default merely by reason of authorizing her to be taken backwards and forwards without hawse pipes. The real causes of the accident were, first, the tug having a bad rope, and, secondly, the other tug not arriving. If the towage had been properly managed the vessel would have been quite seaworthy and safe, and it was unnecessary for her to have anchors at all.

[*The Diamond* (2) was referred to.]

Laing K.C. and *A. E. Nelson* for the respondents. The *Bristol City* was not in a reasonably fit condition to start when she left Bristol on the outward voyage. She was unseaworthy because of the absence of hawse pipes and ground tackle, and Mr. Hill knew she was deficient in these respects.

[LORD STERNDALE M.R. Did he know or ought he to have known that she was insufficiently equipped ?]

He states that he was not a mariner, but he was a shipowner as well as a shipbuilder and must be taken to have the knowledge which a shipowner ought to have as regards the equipment of vessels. It is not necessary to prove knowledge, it is sufficient if he had the means of knowledge. Shipowners must contemplate that tugs may break down or tow ropes part and that their ship may have to anchor. If the vessel had been properly equipped with ground tackle the accident would not have happened, and the plaintiffs were privy to her being insufficiently equipped.

Bateson K.C. replied.

LORD STERNDALE M.R. The *Bristol City* was an unfinished vessel, built at Bristol by the plaintiffs and sent to Cardiff

(1) [1914] 1 K. B. 419, 437; [1915] A. C. 705.
(2) [1906] P. 282.

C. A. 1921

THE BRISTOL CITY.

Lord Sterndale M.R.

to take on board her engines. From there she was to be towed back to Bristol to be fitted. The voyage was a short one; she was taken across by two tugs, and the intention of the owners was that she should be brought back by two tugs. She was not in fact so brought back. When she had her engines on board the second tug had not turned up, and Captain Barclay, the marine superintendent in charge of her, decided to start with only one. She had then only one anchor on board, and about 48 fathoms of wire rope; no cables, no windlass, and no hawsers. As she was coming across the tow rope broke because it was rotten, and Captain Barclay—after trying unsuccessfully to pick up the tug—let go the one anchor. The anchor did not hold. The *Bristol City* drifted for, it is said, about ten minutes, and finally brought up simply by coming across the bows of the *John Ena*. Much damage was done to the latter vessel, and the plaintiffs now seek to limit their liability.

To limit liability is always hard upon the person injured, yet one cannot help feeling a certain sympathy with the plaintiffs because two unfortunate things happened which they could not have contemplated. They did not contemplate that Captain Barclay would start with one tug only. It appears that he made inquiries about the weather and as to the state of the barometer before starting. The weather was not at that time good, it unexpectedly got worse before the *Bristol City* tried to anchor, and that no doubt was the cause of her drifting. The learned President seems to have thought that Captain Barclay was justified in starting when he did, but it appears to me that on the evidence I should have been inclined to hold the contrary. The other thing that the plaintiffs did not know was that the tug's rope was rotten, and they could not be expected to know that. But the question is this: The President found on the advice of the Elder Brethren, that without proper ground tackle the ship was not seaworthy; that is to say although she might, and in all probability would, have come across safely if all had gone right, if anything happened to make it necessary for her to help the tugs, then she was not properly

C. A. 1921

THE BRISTOL CITY.

Lord Sterndale M.R.

equipped with ground tackle so as to be in a position to help. That is to a great extent a matter of nautical skill, and we have therefore taken the opinion of our assessors. I put the question to them in this way. "Considering the ordinary circumstances of navigation on such a voyage as this, was the *Bristol City*, in the condition in which she was, reasonably fit for the voyage, taking into account the fact that it was intended that she should be attended and towed by two tugs?" The answer was: "No, the anchor and length of wire were insufficient, she should have had two anchors and a proper amount of cable." That agrees with the advice given to the President, and even if I wished I should have difficulty in differing from it; but I need hardly say that I do not wish to differ from it. That leaves two questions: Was the absence of proper equipment the cause of the accident? and secondly, did the accident happen without the fault or privity of the plaintiffs?

On the first question it seems to me that the lack of proper equipment was the cause of the accident. Very likely if Captain Barclay had not started with only one tug the accident would not have happened, nor would it have happened if the tow rope had not broken; but, all these things having happened, the last factor is that the vessel, not being provided with proper ground tackle, did not bring up, but drifted down on to the *John Ena*. I have not asked the assessors to put the chances into figures, but the Elder Brethren in the Court below thought that it was about 99 to 1 that with proper ground tackle the collision would have been averted. I think therefore that the want of that equipment was the real effective cause of the accident.

The next question is whether the accident happened without the actual fault or privity of the owners, within the meaning of s. 503 of the Merchant Shipping Act, 1894. [His Lordship read the section.] I think by this section the onus is upon the plaintiffs to show that what happened occurred without their fault or privity. In the Court below Mr. Hill, senior, was called as representing the plaintiffs. He evidently knew very little about the matter. The plaintiffs did not really

know what fault or privity was going to be alleged against them, and they only called the elder Mr. Hill because he happened to be in London. Upon this appeal being entered an affidavit was put in by his partner, Mr. Hill, junior, who did know something about it, for he said that the business connected with the vessel going to and from between Bristol and Cardiff was under his management and supervision, and he knew the ship was not fitted with hawse pipes, that she had no windlass, and that she was provided with one anchor. He goes on to say that the equipment was identical with that of other vessels under the same conditions. Then he says: "I am not a mariner, and have not knowledge of the handling of vessels." But he knew the facts, and the statement that he is not a mariner is not sufficient to show that he did not know that this equipment was inadequate. Mr. Hill, senior, also knew something about these matters, for he gave an answer that in the ordinary course of events a vessel would not be sent to Cardiff and back without hawse pipes if it could be helped. I do not think it unfair to Mr. Hill, junior, to say that probably he would have given a similar answer to his father. But I do not base my judgment on that. Mr. Hill is a shipowner as well as a builder, and it seems to me that the two things must be taken together. The one capacity cannot be separated from the other. He has been sending vessels up the Channel for some time, and, in my view, persons in his position must be taken to know something about their business, and the equipment necessary to make a vessel seaworthy. It is true he says he has on other occasions sent vessels equipped like this, but he does not say he does not know the consequences of sending a vessel on a voyage, however short, without some proper ground tackle; and that obligation is not displaced by his saying "I am not a mariner." I daresay he has no knowledge of the handling of vessels and could not navigate a vessel across the ocean. But that is insufficient. I have considerable sympathy with the plaintiffs, but I feel obliged to say that I cannot interfere with the judgment of the President and the appeal must be dismissed with costs.

C. A. 1921

THE BRISTOL CITY.

ATKIN L.J. I agree. [His Lordship stated the facts and continued:] I am not sure what decision I should have come to if left to myself, but we have the assistance of nautical assessors, and they advise us in the same sense as the President was advised, and, in view of their findings, I find myself unable to come to a different conclusion of fact. Therefore it must be taken that the vessel was not properly equipped. As regards the question whether the loss was caused by that defect, I have no doubt that it was so caused. Perhaps it would not have happened if there had been two tugs, or if the rope had not parted; but these events having happened, I think there is no doubt that, in the end, the accident happened through the want of proper ground tackle.

There arises the further question whether the accident happened without the fault or privity of the owners. It seems that the Hills, junior and senior, between them knew the facts, and the question is whether they can negative the knowledge that the ship was in effect unseaworthy. Hamilton L.J., as he then was, in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1) said: "Where the Legislature has selected one adjective for employment, I think little is to be gained and often much to be lost by paraphrasing it with another. Actual fault negatives that liability which arises solely under the rule of 'respondeat superior.' In that sense it conveys the idea of personal fault, but it does not necessarily mean that the owner must have laid the train or set the torch himself. Nor again does it mean that the owner must have been the sole or next or chief cause of the fire. It is fire 'without his actual fault,' not fire 'except where caused by his natural action.' The question is, could it be said of the fire that the owners had nothing to do with it but only their servants, or that for this fire not they but only their servants, if any person, were to blame? It is not enough that the happening of the fire is the servants' fault; it must also not be the owner's fault." Here there was knowledge of the two managers as to the facts, and they were responsible for the

(1) [1914] 1 K. B. 419, 436.

vessel's equipment. It might be said that they yet did not know what ground tackle was necessary, but it is quite plain from the evidence of Mr. Hill, senior, that they were owners as well as builders, and under these circumstances I think they should have had a knowledge of what is seaworthy and what is not. In my view, the onus is upon the plaintiffs to establish that they did not know this vessel was not properly equipped, and I think it is impossible to say that they have discharged that onus. I think therefore that the appeal fails.

YOUNGER L.J. So soon as it is found that the damages are attributable to the absence of proper ground tackle on the *Bristol City*, it is, I think, clear that the plaintiffs have not established that that state of things happened without their fault or privity. I am constrained, although with reluctance, to accept that position and concur in a finding against them. But I have found it difficult in the circumstances of this case to disabuse my mind of the impression that the relevant cause of the accident was not so much the absence of ground tackle, as that, without the fault or privity of the plaintiffs, the vessel started from Cardiff with one tug only. I have had difficulty in getting rid of the impression that the accident was due to the fact that Captain Barclay undertook this voyage disregarding the regulations of the owners in the matter of tug power. I have found it difficult to disabuse my mind of the conviction that had the *Bristol City* on her return voyage from Cardiff been in charge, as was intended, of two tugs the absence of proper ground tackle would have been quite innocuous. But I have abandoned that view in face of the strong opinions held by my Lord and the Lord Justice.

Appeal dismissed.

Solicitors for the appellants : *Thomas Cooper & Co.*
Solicitors for the respondents : *William A. Crump & Son.*

E. C. M. T.

1921
July 5, 12.

ADMIRALTY.

THE EVA.

Admiralty—Actions in rem—Priorities—Wages and Necessaries Men—Master who is part Owner—Foreign Tax on Sale of Vessels—Payment out of Court in default Actions—Caveats—Practice.

When the master of a foreign ship is also a part owner his claim for wages and disbursements is postponed to the claim of persons who have supplied necessaries to the ship.

The Jenny Lind (1872) L. R. 3 A. & E. 529 followed.

By Finnish law 2½ per cent. of the sale price of a Finnish vessel sold out of Finnish nationality is taken by the Finnish Government:—

Held, that the Finnish Government had no claim upon the proceeds of sale of a Finnish ship sold by the marshal under the powers of the Court in a default action in rem.

A party moving for payment out in a default action in rem must give notice to all persons who have intervened or entered caveats, and if persons wish to resist an application for payment out they must intervene or enter caveats, otherwise they are not entitled to be heard.

Motions to confirm reports of the registrar and for payment out of a fund in Court representing the proceeds of sale of the sailing vessel *Eva* of the port of Helsingfors.

The *Eva* arrived at West Hartlepool on December 23, 1920, and on March 11, 1921, was arrested in respect of a claim for repairs by F. O. Kindberg, Ld., of West Hartlepool. No appearance was entered on behalf of her owners, and on May 31, 1921, she was sold by public auction and realized 830*l.* In addition to the action by Messrs. Kindberg actions were instituted by the master and crew of the *Eva* for wages and subsistence money, and by Albert Assmann of West Hartlepool in respect of necessaries. The registrar had reported that 452*l.* 8*s.* 8*d.* was due to Messrs. Kindberg, 325*l.* 11*s.* 8*d.* to Mr. Assmann, and 499*l.* 3*s.* 4*d.* to the master and crew.

On July 5, 1921, the motions came before the Court. In the motion on behalf of the master and crew Hill J. confirmed the registrar's report and ordered payment out of 236*l.* for the crew's wages and viaticum. The master's

application for payment out was adjourned, as it was objected on behalf of Messrs. Kindberg and Mr. Assmann that the master was a part owner and therefore responsible to these claimants. Neither of these claimants had intervened in the action by the master and crew or entered caveats against payment out.

Hill J. in the course of his judgment on this part of the case said: "In order that the practice of the Court, which has become a little lax, may be put into proper form I think it well to state that when any party has obtained judgment in a default action he is entitled to move for payment out, but he must give notice of that motion to any persons who have intervened or entered caveats against payment out. If that procedure is strictly followed he is not under any obligation to give notice to any other persons. If any other claimants against the fund want to be in a position to resist an order for payment out they must, to entitle them to be heard, intervene or enter caveats. Unless that practice is followed, a party who is going to move the Court for payment out has no means of making sure that he has brought before the Court all the persons entitled to be heard. In the present case none of the parties now before me have intervened or entered caveats, but I shall adjourn the case for a week to enable them to do so."

On July 12 the matter came before the Court again when, in addition to the claims already mentioned, an application was made on behalf of the Finnish Government, who claimed 2½ per cent. of the price realized for the vessel under a Finnish law, whereby on every Finnish ship sold abroad 2½ per cent. of the purchase price goes to the Finnish Government.

Alfred Bucknill for the master and crew of the *Eva*.
A. Stone-Hurst for F. O. Kindberg, Ld.
J. Ellis Cunliffe for Albert Assmann.
H. I. Stranger for the Finnish Government.

HILL J. In this case I have already given judgment for the master suing for wages and disbursements, for the crew

1921

THE EVA.

HILL J.

suing for wages, for Messrs. Kindberg in respect of repairs, and for Mr. Assmann for necessaries. I also ordered payment out of 236*l.* to the crew for their wages, because they clearly come first.

In the ordinary course the master's claim for wages and disbursements would also come first, but the matter stood over for argument and evidence, objection being taken that the master could not claim in priority to the necessaries and repairs men, because he was himself a part owner and had himself given orders for the repairs and necessary supplies, and therefore became personally liable on the contract.

It has been frankly admitted for the master that he gave the orders on the instructions of his owners, and also that he is the owner of 1/30th share in the ship. That puts him in a very unfortunate position. The authority on the point is *The Jenny Lind* (1), where a master and part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, and it was held that the persons who supplied them were entitled to be paid for the necessaries out of the proceeds of the ship and freight in priority to a claim by the master for wages and disbursements. It is true that the case in part proceeded on the assumption that it was a question of competing maritime liens, Sir Robert Phillimore treating the necessaries men as if they had a maritime lien, and Mr. Bucknill sought to distinguish it on that ground; but further reasons for the judgment show that it was not decided only on that ground, reasons which seem to apply quite apart from the question of the necessaries men having a maritime lien. The master, as part owner, was held personally liable to the necessaries men. Consequently if, in the present case, he ranked in priority to them, they would be in a position to attach the debt. There is good reason, therefore, why they should be preferred, and I cannot prefer the master's debt to the debts of the repairs and necessaries men.

Certain costs have to come out first. The fund was realized

(1) L. R. 3 A. & E. 529.

in Messrs. Kindberg's action and the costs of realization will come first. Then there are the costs of the master and crew's action. The master and crew joined together, and the crew certainly came before everybody else. The costs of that action are not enhanced by the addition of the master, and, therefore, up to the time of the confirmation of the report, those costs must rank next. The balance of the fund will not be nearly enough to pay Messrs. Kindberg and Mr. Assmann and, therefore, they will rank pari passu. That will exhaust the fund.

There remains the application on behalf of the Finnish Government. It is said that the *Eva* is a Finnish ship, and that by Finnish law that Government takes 2½ per cent. of the sale price of Finnish ships sold out of Finnish nationality. That no doubt is imposed to prevent the sale of Finnish ships abroad. Mr. Stranger argues that he is entitled to have that right recognized here. He makes his application without notice of motion and without entering a caveat, but I will treat him as being properly here. He has no affidavit to prove that the *Eva* was a Finnish ship. I have no affidavit to the contrary, but I have an affidavit by the master from which it looks as if the *Eva* were an Esthonian and not a Finnish ship. I will assume, however, that she was Finnish. To my mind the fact that by Finnish law the Finnish Government upon the voluntary sale out of the Finnish Registry of a Finnish ship can charge the owners 2½ per cent. on the sale price, gives them absolutely no right in regard to such a sale as has taken place in this Court. It does not appear that in Finnish law there is any right in rem or a maritime lien in respect of this charge, although I have no doubt that a ship sold in Finland can be prevented from leaving that country until the tax is paid. But the *Eva* was not sold under Finnish law. She was sold like any other chattel belonging to a foreigner which has been seized in this country under the powers of this Court, and the title passes not by reference to Finnish law, but by reference to English law. To such a sale taxes leviable in a foreign country upon the voluntary transfer of a ship appear to me to have no reference

1921

THE EVA.

whatever. Therefore, even assuming the Finnish Government has properly appeared here, they have no right such as they allege. Therefore I dismiss this application.

Solicitors for the master and crew of the *Eva*: *Willis & Willis, for Edward Fryer & Webb, West Hartlepool.*

Solicitors for F. O. Kindberg, Ld.: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for Albert Assmann: *Bell, Brodrick & Gray, for Harrison & Son, West Hartlepool.*

Solicitors for the Finnish Government: *Best & Best.*

E. C. M. T.

C. A.

1921

May 9, 10, *July* 15

[IN THE COURT OF APPEAL.]

THE CAP PALOS.

Admiralty—Towage—Breach of Contract—Exceptions in Towage Contract—"Default of steam tug owner"—Failure to carry out Contract.

The defendant contracted to tow the plaintiffs' schooner *C. P.* on a round voyage of which the first stage was Immingham to Hartlepool. Through the negligence of the defendant's tug masters the vessels got into Robin Hood's Bay on the night of October 23. The tugs got aground and lost their hawsers and the *C. P.* came to anchor. The tugs got afloat on the early morning of October 24 and proceeded to Hartlepool, leaving the *C. P.* in the bay with a rising N.E. wind. The *C. P.* remained in the bay making vain attempts to get out until October 26, when about 3 P.M. she drifted on to the rocks and became a constructive total loss. It appeared that the defendant had ordered another tug to go to the *C. P.*, but cancelled the order, as he thought (erroneously) that the Salvage Association had sent tugs to her assistance. In an action by the plaintiffs for the loss of their vessel by reason of the defendant's breach of contract or duty the defendant pleaded the exception clause in the towage contract whereby the tug owner was not responsible (inter alia) for "any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, ... whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mis-management, negligence, or default of the steam tug owner, or any of his servants or employees . . . .":—

Held, that as the defendant had at any rate temporarily given up any attempt to continue the towage and had left the performance of his

duty to others, he could not avail himself of the words "default of the steam tug owner," which only extended to cover defaults during the actual performance of the duties of the contract.

Decision of Hill J. reversed.

C. A. 1921

THE CAP PALOS.

APPEAL from a decision of Hill J. in an action for damages for breach of contract.

The plaintiffs (appellants) were the owners of the five-masted schooner *Cap Palos*. The defendant was George Alder, tug owner of Middlesbrough.

The facts are summarized in the headnote and are fully stated in the judgment of Atkin L.J.

The plaintiffs claimed that the loss of the *Cap Palos* was due to the insufficiency of power of the defendant's tugs and to his failure to supply a tug of sufficient power to continue the performance of the contract.

The defendant pleaded that the loss of the vessel was due to the negligence of those in charge of her in attempting to get under way and failing to wait until towage assistance arrived or the weather moderated. In the alternative the defendant relied on the exceptions in the towage clause.

Hill J. in giving judgment, after finding that there was no negligence on the part of the plaintiffs, but that the plaintiffs had failed to prove that the defendant by failure to supply tugs of sufficient power caused the *Cap Palos* to get into Robin Hood's Bay, continued as follows: "That the tugs negligently left the *Cap Palos* in Robin Hood's Bay, as the Elder Brethren and I think they did, gives the plaintiffs no cause of action; the exceptions protect the defendant. There remains the question whether the defendant is liable for failure to send help on October 24, 25 and 26. In the opinion of the Elder Brethren if help had reached the *Cap Palos* at any time up to midday on the 26th she could have been saved. On the 24th it was blowing a strong breeze from the N.E. with squalls, and also on the morning of the 25th, but later in the day the wind decreased and got to N. and then W.N.W.; and on the 26th, although it again increased in force to a fresh and strong breeze,

C. A. 1921

THE CAP PALOS.

it was north-westerly. No sufficient effort was made by the defendant, and on the evening of the 25th he gave up any attempt and countermanded orders he had given to his tug the *J. P. Renoldson*. Whether he did this on the advice of the acting Lloyd's agent at Whitby, or on information from some other source that tugs had been sent from the Humber, it is unnecessary to decide. Lloyd's agent was not the plaintiffs' agent and there was nothing to discharge the defendant from his duty to continue to carry out his contract.

"But then comes the exception clause. Among other exceptions are: 'The acts, neglect, or default of the masters, pilots or crews of the steam tugs . . . . or any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed . . . . whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owner, or any of his servants or employees.' The clause is as wide as possible. It is not confined to acts of the defendant's servants, but includes those of the defendant himself. In my view 'any omission, breach of duty, mismanagement, negligence or default' of the steam tug owner means 'any' and includes 'all'; and I am unable to see any escape from the conclusion that the tug owner, by reason of the exceptions in the contract, is not liable for the fault which I have found. There must therefore be judgment for the defendant."

The plaintiffs appealed.

Butler Aspinall K.C. and *Balloch* for the appellants. The defendant cannot avail himself of the exceptions in the towage contract because he had repudiated the contract: cf. *Jureidini* v. *National British and Irish Millers Insurance Co.* (1) and *Braithwaite* v. *Foreign Hardwood Co.* (2) The learned judge found there was a failure to carry out the contract with reasonable industry; and even assuming that the contract was still in being at the time of the loss, the

(1) [1915] A. C. 499. (2) [1905] 2 K. B. 543.

tug owner is not entitled to suspend his contractual obligations and at the same time to pray in aid that it is not a breach of duty. If he fails to use reasonable industry to continue the towage and carry out the contract the words relied on were not intended to relieve him from responsibility. The exception "breach of duty" only applies to torts and not to breaches of contract.

Further, the learned judge was wrong in holding that the tugs provided were of sufficient power, and the defendant is liable for not supplying tugs reasonably fit for the service: *The West Cock.* (1)

Mackinnon K.C., *D. Stephens K.C.* and *Dumas* for the respondent. The learned judge was correctly advised as to the tugs provided being of sufficient power. [They were stopped on this point.] The remaining question is whether the defendant repudiated the contract. Repudiation was not pleaded or argued before the learned judge and he gave no finding upon the point. The fault alleged was a breach of contract in not taking proper steps to continue the towage. On the facts, however, the weather was too bad for the tugs to leave Hartlepool where they had gone to get new hawsers, and the defendant, hearing that two powerful tugs were being sent to the assistance of the *Cap Palos*, cancelled the order for his own tugs to go on the night of the 25th; but that is not inconsistent with an intention for them to resume their towage next morning when the weather moderated. In *Bradley* v. *Newsom, Sons & Co.* (2) it was held that the crew of a ship who left her to avoid being killed by shell fire from a submarine had not abandoned the ship without hope of returning; similar considerations apply in this case, and it cannot be said that in leaving the *Cap Palos* to avoid perils of the seas the tugs had abandoned the adventure. Under the exception clause a tug owner who deliberately cast off the tow rope would be covered by the words "breach of duty . . . . or default."

Butler Aspinall K.C. replied.

Cur. adv. vult.

(1) [1911] P. 208.

(2) [1919] A. C. 16.

C. A. 1921

THE CAP PALOS.

July 15. The following judgments were read :—

LORD STERNDALE M.R. This is an appeal from Hill J., who gave judgment in favour of the defendant in an action brought against him by the plaintiffs for the loss of the plaintiffs' vessel, the *Cap Palos*, by reason of breach of contract or of duty by the defendant. The action was brought in respect of a contract of towage, and the learned judge held that the defendant was protected from liability by the exceptions in that contract.

The contract was to tow the *Cap Palos* on a round voyage, of which the first stage was from Immingham to Hartlepool in ballast. No tug was named for the service, but it was admitted by the defendant that under the contract there was an obligation on him to provide sufficient tug power. The first tug provided was not of sufficient power, but the defendant provided a second, and the towage proceeded with interruptions until the tugs and tow found themselves in Robin Hood's Bay. The tugs lost their hawsers, which had parted and left the tow in Robin Hood's Bay. After vainly trying to get out of the bay she anchored there on the night of October 24. On the 25th she again tried to get out of the bay, but failed, and on the 26th she was driven on to the rocks, and became a constructive total loss. It is for this loss that the plaintiffs make their claim upon the defendant.

The *Cap Palos* was fitted with an auxiliary motor, but it was out of gear, and she had to depend upon her sails. It was not contemplated by either party that the motor should be used. The details of the towage up to the time of getting to Robin Hood's Bay are in my opinion not relevant to the question before us, and are quite sufficiently dealt with by Hill J. Owing partly to the defective power of the first tug, and partly to other causes, the towage took much longer, and there were many more interruptions than were expected or than there should have been, but the towage did go on, and in my opinion did go on under the contract. The only point made at the trial on this part of the case was that the tugs and tow got out of their course and into Robin Hood's

Bay, because the two tugs, attached as they were to the tow and one another, were of insufficient power to avoid their being set out of their course towards the shore. Hill J. was advised by the Elder Brethren that the tug power was sufficient if properly handled, and the same advice was given to us by our nautical assessors. The learned judge came to the conclusion that the tugs got into Robin Hood's Bay by bad navigation in not making allowance for a change of wind, not hauling out when a mist came on from a course which would take them very near Robin Hood's Bay, and not using the lead, but he held that the defendant was protected from the consequences of this negligence of the tug masters by the exceptions in his contract. I agree with the learned judge in his decision on this part of the case.

The question as to the rest of the case is quite different. I agree with Hill J. that if assistance had been sent to the *Cap Palos* at any time up to midday on the 26th, which was Sunday, she could have been saved from becoming, as she did, a constructive total loss, although she might have been damaged to a certain extent. It was the defendant's duty under his contract to send such assistance, and he did not send it; and the questions are, whether upon the facts he is excused from performing that duty, and, if not, whether he is protected by the exceptions. The reason why nothing was done on the 24th is not quite clear, but I think the result is that the defendant attributes it to a combination of bad weather and unpreparedness of the tugs, which had arrived in Hartlepool without their hawsers, which they said they had lost in Robin Hood's Bay, and had not yet been supplied with new ones, which the defendant took steps to supply. According to the defendant the tugs were ordered to go to the *Cap Palos* on the morning of the 25th, and were fitted to do so, but the masters refused to go because of the weather. I doubt whether the weather was bad enough to prevent their going, and also whether they ought to have left the *Cap Palos* in Robin Hood's Bay and gone to Hartlepool; but it is not necessary to decide either of those points,

C. A. 1921

THE CAP PALOS.

Lord Sterndale M.R.

because in my opinion these omissions of duty, if they existed, were those of the masters of the tugs, against which the defendant is protected by the exceptions in his contract. Some explanation of the circumstances may be afforded by the fact that the master of one of the tugs, the *Symbol*, was not in the service of the defendant, but of a firm from whom the defendant had just bought her, and was only in command of her for the purpose of taking her round from Southampton and delivering her to the defendant. On her way round she was sent to perform this towage. The master seems, from the correspondence, to have been anxious to get back with his crew to Southampton, and very likely did not want to renew a towage on the east coast in weather that was not good, while the master of the other tug may have been influenced by his example. The question, however, is not very material, because the defendant is not excused from the performance of his duty if he had means of performing it without using these tugs. It is clear that he had these means, for he had another tug, the *J. P. Renoldson*, which he in fact ordered on the 25th to go to the *Cap Palos* after he had been to Robin Hood's Bay and heard of the refusal of the other tug masters. Unfortunately he cancelled these orders later in the day, and from this the whole trouble has arisen, for there is no reason to think that the *J. P. Renoldson* could not have reached the *Cap Palos* in time to be of use.

The reason given for the cancellation of the orders to the *J. P. Renoldson* is as follows: the defendant gave evidence that a Mr. Milburn, the brother of Lloyd's agent at Whitby, and then acting for him in his absence, showed him a telegram to the effect that Grimsby underwriters were sending two powerful tugs expected to arrive that night. Mr. Milburn denied having shown him any telegram of that kind. I think it is very probable that the defendant did get some intimation of the kind, because the facts were that the captain of the *Cap Palos* had communicated with Lloyd's agent, whose son, acting for him, did communicate with the Salvage Association (who of course act for underwriters in these

cases); that the Salvage Association at Grimsby did send a powerful tug; that the ship's agent at Grimsby so informed the ship's agent at Liverpool after the vessel had been driven ashore; and that Mr. Milburn, the acting Lloyd's agent, had a recollection which he described as faint, that he had heard that tug boats were coming from Grimsby.

The *Cap Palos*, though not insured in England, was re-insured here, and the matter seems to have followed the ordinary course where the Salvage Association are concerned with a ship in distress. Unfortunately, the tug sent by them was obliged by weather to put into Bridlington Bay, and could not reach the *Cap Palos*. On getting this information as to the tug, the defendant assumed that he might safely leave the matter in the hands of the Salvage Association, so far as getting the vessel into a place of safety was concerned, and cancelled the orders to the *J. P. Renoldson*. I agree with Hill J. that it is not necessary to determine the question, hotly contested at the trial, as to whether this information was given to the defendant by Lloyd's agent, because I also agree with him that however the defendant got it he was not thereby relieved from his obligation to send the *J. P. Renoldson* or some other efficient tug to the help of the *Cap Palos*, and so continue to carry out his contract. It may be that when the Salvage Association send a tug to tow a vessel out of danger and the tug arrives they do in practice take charge of the operations until the vessel is in a place of safety without the help or interference of any one who has a towage contract with her owners, because their tugs are better fitted and equipped, and their crews better skilled in such work; but that, if correct, does not discharge such a person from the obligations of his contract. The Salvage Association's tug may, as in this case, not arrive, or many other things may happen which require him to discharge that obligation, and I agree with Hill J. that in cancelling the orders to the *J. P. Renoldson* and leaving to the Salvage Association the towage of the *Cap Palos* from a position of danger to a place of safety, the defendant failed

C. A. 1921

THE CAP PALOS.

Lord Sterndale M.R.

to fulfil the obligations of his contract, and was guilty of a breach of it.

Then there arises the question of whether the learned judge was right in holding that the defendant was protected by the exceptions in the contract. The main argument against his decision before us was based upon an attempt to show that the defendant, after the *Cap Palos* went ashore, wholly repudiated all obligations under the contract, and could not, therefore, avail himself of the exceptions. This is a question of fact upon which there should have been a finding by the learned judge. I am quite satisfied from the pleadings, the arguments of counsel as appearing in the judge's note, supplemented to a certain extent by shorthand notes and by the judgment, that this point was never raised at the trial. The evidence to which we were referred on the point confirms me in this opinion, for, considering the counsel and the judge, I do not believe it would have been left as it is without further investigation if the point had then been before the Court. It was admitted that the learned judge was not asked for a finding on the point. I doubt, therefore, very much if it was competent for the appellants to raise the point in this Court, but it is not necessary to decide this, because of the view that I take of the case on other points, and also because I think no such repudiation is proved by the evidence. I think what is proved is that the defendant gave up any attempt to tow the vessel from danger to a place of safety, but that he never repudiated his contract to continue his towage after she was brought to a place of safety. There was evidence given by him that he ordered the two tugs originally engaged to go to Robin Hood's Bay in case they were wanted. If this were true it is some evidence of an intention to go on with his contract; if it were not true the judge should have been asked for a finding on the point. I do not think that the finding of the learned judge that the defendant gave up any attempt was intended by him to be a finding of more than I have stated, that is, that he gave up any attempt to do what he thought the Salvage Association tug was going to do.

C. A. 1921

THE CAP PALOS.

Lord Sterndale M.R.

No other question was present to the learned judge's mind, and I do not know how he would have found on any other point which might have been, but was not, brought to his attention. It was argued that on these facts, as I have stated them, this exception ceased to apply, because the contract was changed in character on the analogy of deviation as in the case of *Lilley* v. *Doubleday*. (1) This may be so, and I say nothing to the contrary, but I prefer to base my judgment on another ground. The exception clause in the towage contract is as follows: "The steam tug owner is not responsible for the acts, neglect, or default of the masters, pilots, or crews of the steam tugs, or of consulting engineers, ships husbands, or other persons in his employment, or for any loss of life or injury to persons, or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, or cargo on board of same, or any other ship or cargo, or any pier, wharf, or other property through collision or otherwise, whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mis-management, negligence, or default of the steam tug owner, or any of his servants or employees, or by any defect or imperfection in the steam tugs or their machinery or the towing gear, or its attachments or appurtenances, or tug's hawsers or ropes if in use, or any of them, whether such defect or imperfection is in existence before or at the commencement of the towage, or arises during or after the performance thereof, or from the steam tug running short of coal, or from delay, stoppage, swiftness or slackness of speed, however occasioned, or for what purpose soever taking place, or from any perils of the seas, rivers or navigation, or from strikes, lock-outs, labour disturbances, disputes or anything done in contemplation or furtherance thereof, whether the steam tug owner be parties thereto or not, or for any of the consequences of the causes above excepted." Really the words held to protect the defendant are "damage otherwise than by collision" to a vessel being towed or having been towed by reason of the default of the

(1) (1881) 7 Q. B. D. 510.

C. A. 1921

THE CAP PALOS.

Lord Sterndale M.R.

steam tug owner. These words, isolated from their context, are very wide, and may cover the case, but there are numerous cases which decide that a limitation may be put upon such wide words if the construction of the whole clause requires it. I think that is the case here. I do not think it is necessary to say that in no case can the words " default of the owner " refer to a breach of contract, but I think that the whole clause points to the exceptions being confined to a time when the tug owner is doing something or omitting to do something in the actual performance of the contract, and do not apply during a period when, as in this case, he has ceased even for a time to do anything at all and has left the performance of his duties to some one else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to some one else for performance.

I think, therefore, the appeal should be allowed and judgment entered for the plaintiffs with costs here and below.

ATKIN L.J. This is an action for damages for breach of a contract of towage, whereby the plaintiffs' ship was lost. The learned judge has held the defendant excused by reason of the exceptions contained in the contract. It is not disputed that the defendant's ordinary conditions of towage were incorporated in the contract made between the parties, and the only question to be determined is, whether under the circumstances they apply so as to protect the defendant. It is contended by the plaintiffs that they do not apply because at the time of loss the defendant was not performing, and had temporarily at any rate abandoned performance of the particular contract to which the exceptions related. Some statement of the facts is necessary.

The plaintiffs' ship, the *Cap Palos*, was a Canadian five-masted schooner of 1468 tons gross register, and was 242 feet long. She was fitted with an auxiliary motor, but at the time of the voyage in question, to the knowledge of all

parties, the motor was out of order, and was not intended to be used. By the contract in question the defendant agreed for a lump sum to tow the *Cap Palos* from Immingham to Hartlepool, thence after loading a cargo of coal to Gothenburg, and thence after discharging and loading back to an east coast port. It was a contract for a round voyage to be performed in stages. The first stage was from Immingham, where the vessel lay, to Hartlepool, a voyage of about 100 miles, which in ordinary course of towage it was contemplated would take fourteen to fifteen hours. The voyage began on Tuesday, October 21, at 1 P.M., when the tug *Symbol*, provided by the defendant for the purpose of the contract, made fast to the *Cap Palos* in Immingham Dock. At 2.30 P.M. the tug and tow had cleared the docks, and fifteen hours, the contemplated period of the first adventure, would have seen them arrive at Hartlepool on October 22 at 5.30 A.M. Their hopes were disappointed. The towing had proceeded for only four and a half hours when the *Symbol* cast off, the master saying he could not handle the *Cap Palos* unaided. He went off for an assistant tug, and an addition to his crew. The *Cap Palos* anchored off the Spurn and remained there for thirty-seven hours, until Thursday, October 23, at 9 A.M., when the *Symbol* arrived with news of another tug to arrive. The *Symbol* towed for an hour, when she cast off for engine trouble, and for three hours the *Cap Palos* proceeded under her own sail. At 1 P.M. the *Symbol* made fast again and towed until 6 P.M., when the second tug, the *Cabot*, arrived and made fast somewhere off Flamborough Head. Both tugs then proceeded to tow the *Cap Palos;* for the first time the defendant had supplied sufficient towage power to perform the contract. The towage proceeded until 10.30 P.M., when both tugs found themselves ashore in Robin Hood's Bay. The tow ropes parted; the schooner tried to make her way out of the bay, failed, and anchored in the bay. The tugs got off about 2.30 A.M. and disappeared, leaving the schooner in the bay with a N.E. wind, moderate breeze, rising. This was all the towage the defendant ever did. The schooner remained in the bay making

C. A. 1921

THE CAP PALOS.

Atkin L.J.

vain attempts to get out until Sunday, October 26, about 3 P.M., when she drifted on to the rocks, and became a constructive total loss. The history of the towage in hours, as appears from the above record, is 4½ hours' towage, 37 no towage, 1 towage, 3 no towage, 9½ towage, 61 no towage, of which only six hours' towage was efficient, a remarkable divergence from a contract for about fifteen hours' continuous towage. This closely resembles Alice's "jam every other day," tug yesterday and tug to-morrow, but never tug to-day. The figures appear to me to indicate such delay as to make the purported performance something quite different from that contracted for, a form of deviation quite familiar in marine adventures.

But the consideration of the defendant's performance of this contract cannot end with a bare enumeration of hours of towage. Evidence was given of his actions during the period from 10.30 on the Thursday, when the towage ceased, and 3 P.M. on Sunday afternoon, when the schooner went aground. On the Saturday the defendant himself visited Robin Hood's Bay, and apparently made arrangements that a fresh tug, the *J. P. Renoldson*, then at Middlesbrough, should proceed to the rescue. But on receiving a message, not identified, that two powerful tugs were being sent to the scene on behalf of underwriters on Saturday evening, the defendant cancelled those arrangements and, as found by the learned judge, gave up any attempt to help the schooner. Much argument was addressed to us to show that this finding was contrary to the evidence. In my opinion, though there was evidence each way, there was ample evidence to justify the judge, who saw the witnesses, in arriving at this finding. The judge has also found that if the defendant had continued to attempt to carry out his contract with reasonable industry the schooner could have been saved up to Monday or Sunday.

The question that arises is whether under the above circumstances the defendant can rely upon the exceptions. In my opinion they have no application in the facts of this case. It is immaterial to discuss whether the true view is

that the wide words of the exceptions " default," " omission," " breach of duty " properly construed do not extend to cases where the contracting party ceases altogether to perform the contract; or that the exceptions construed in their widest sense do not apply where the contract is not being performed at all. The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance (Marine Insurance Act, 1906, ss. 45–48); carriage by sea and river (*Morrison & Co.* v. *Shaw, Savill & Albion Co.* (1), *Davis* v. *Garrett* (2); by land (*Mallet* v. *Great Eastern Ry. Co.* (3), *Lilley* v. *Doubleday* (4)); and contracts of bailment. " The principle is well-known, and perhaps *Lilley* v. *Doubleday* (4) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it ": per Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (5) If the tugs on the orders of the defendant had cast off the tow in a storm on a lee shore for the purpose of engaging in a more profitable salvage operation, and the tow were in consequence damaged, could it be suggested that the intention of the contract was that the defendant should be protected? It is not, as was contended, a question of a repudiation of contract which has to be accepted by the other party in order to give rise to a claim for breach. The tow might go to the bottom protesting to the last moment and claiming fulfilment of the contract and yet the defendant would, in my judgment, in such a case fail to be protected by his exceptions. I am far from saying that a contractor may not make a valid contract that he is not to be liable for any

(1) [1916] 2 K. B. 783.
(2) (1830) 6 Bing. 716.
(3) [1899] 1 Q. B. 309.
(4) 7 Q. B. D. 510.
(5) [1921] 2 K. B. 426, 435.

C. A. 1921

THE CAP PALOS.

Atkin L.J.

failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose, which I do not find here.

For the above reasons I come to the conclusion that the exceptions in this case afford no defence to the claim and that effect must be given to the learned judge's findings of fact, and judgment entered for the plaintiffs for damages to be assessed by the registrar and merchants.

YOUNGER L.J. I am entirely of the same opinion.

One of the respondent's conditions of towage to which reference has been made in the judgments just delivered is as follows: "If a steam tug is engaged to tow a ship to any port or station, but through stress of weather or other unavoidable circumstances, she is separated from the ship, the steam tug owner shall be paid (pro rata) for the distance towed, unless otherwise mutually arranged." This condition seems to supply some indication of the circumstances in which separation of the tug from the tow was in the contemplation of this contract regarded as permissible. The circumstances did not exist here. The tugs, the learned judge finds, negligently left the *Cap Palos* in Robin Hood's Bay on the morning of October 24. That negligent act, however, was the act of the masters, and from that the conditions protect the respondent. But the constructive total loss of the vessel was not due to that negligent act. It was due to the neglect and default of the respondent himself, fully cognisant as he was of the facts, and of the situation of the *Cap Palos*, in not sending before noon on October 26 a tug or tugs to assist her in the position of danger in which she had been left, and incidentally to proceed with the completion of the first part of his contract of towage, the prosecution of which he had for the time abandoned. I agree in the view that from that personal neglect and default of his own at such a time and in such circumstances, the conditions of towage afford no protection to the respondent even if the explanation he offers of his failure to send the tug *J. P. Renoldson* to the assistance of the tow can on the evidence

be accepted, a subject upon which I refrain from further observation.

I think the appeal should be allowed.

C. A. 1921

THE CAP PALOS.

Appeal allowed.

Solicitors for the appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondent: *Van Sandau & Co., for Belk & Smith, Middlesbrough.*

E. C. M. T.

ADMIRALTY.

1921 *July* 26, 28.

(IN PRIZE.)

THE NEW SWEDEN.

Prize Court—Seizures from Parcels Mail—Transit by Rail—Packages damaged by Fire—Packages subsequently placed in Custody of Marshal—Goods not covered by Marshal's Policy of Insurance—Reprisals Order in Council of March 11, 1915, *art.* 4.

By art. 4 of the Reprisals Order in Council of March 11, 1915: "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court. . . . ."

A number of postal mail bags believed to contain packages of enemy origin were taken off a Swedish vessel at Kirkwall and were handed by the Customs authorities to the postal authorities for transmission to London for examination. While in the course of transit by rail a fire broke out in the mail van and the contents of many of the bags were destroyed or damaged. The bags were opened in London by the postal censor and a number of packages, including some packages of gloves, were seized as prize and placed in the custody of the marshal. A writ in prize was issued and decrees were subsequently made under the Reprisals Order in Council that the packages of gloves were of enemy origin and were enemy property, and they were ordered to be sold and the proceeds to remain in Court until the end of the war. After the war the proceeds were released to the claimants, an American firm, who claimed damages on the ground that the goods had suffered damage by fire and had in consequence realized less than they ought to have

1921

THE NEW SWEDEN.

done. Goods in the custody of the marshal automatically come under a floating policy of insurance against loss or damage by fire:—

Held, (*a*) that the marshal was under no obligation to insure the claimants' goods, although, had they been in his custody as soon as they were taken off the ship, they would have been insured and the claimants would have received the benefit of the insurance;

(*b*) that there was no obligation under art. 4 to put the goods in the custody of the marshal until it had been ascertained that they were subject to seizure, and that this could not reasonably be ascertained until the bags had been examined in London;

and (*c*) that as the captors had not been guilty of negligence or of failure to take reasonable care of the goods the claim for damages failed.

MOTION for damages in respect of the loss suffered by the claimants owing to the damage by fire to a number of packages of leather gloves seized under the Reprisals Order in Council of March 11, 1915. The facts, which were not in dispute, are summarized in the headnote and are fully set out in the judgment.

Raeburn K.C. and *W. Price* for the claimants. It is not suggested that the fire arose through the negligence of the captors; but qua the owners of the goods the transit by rail was unauthorized, and for purposes of their own the captors had no right to forward the goods by rail before placing them in the custody of the marshal. They are therefore liable if the goods are lost or damaged. Had the goods been placed in the marshal's custody at Kirkwall they would have been insured under his floating policy and the claimants would have had the benefit of it. The insurance by the marshal of goods seized under the Reprisals Order in Council is a reasonable and necessary precaution and is for the benefit of claimants: *The United States.* (1) Under the Reprisals Order the goods seized "shall be placed in the custody of the marshal." That means as soon as the goods are taken off the ship. The Crown knew that these goods would be uninsured until they were placed in the marshal's custody and accordingly is liable for the damages arising from a failure to comply with the terms of the Order.

Geoffrey Lawrence for the Procurator-General. The captor

(1) [1920] P. 430.

1921

THE NEW SWEDEN.

is not an insurer of seized goods, and his duties are those of a bailee: *The Südmark.* (1) There was no obligation to insure these goods at all, and *The United States* (2) is not an authority to the contrary. The directions given by the Crown as regards the custody of goods seized as prize are administrative only and do not enure to the benefit of claimants: *The Südmark.* (1) The Reprisals Order confers no special rights on the owners of goods seized and the ordinary principles of prize law are applicable. Art. 4 of the Order does not provide that goods seized thereunder shall "forthwith" be placed in the custody of the marshal. In the case of seizures from the letter and parcel mail it would be quite impracticable to examine the mail bags at Kirkwall, and the practice followed throughout the whole period during which the Order was in force of sending the suspected bags to London and then placing in the marshal's custody the packages found on examination to be of enemy origin or destined for the enemy constituted a reasonable compliance with the terms of the Order.

W. Price replied.

Cur. adv. vult.

July 28. THE PRESIDENT (SIR HENRY DUKE). This is the claim of the Topken Company, a firm having its commercial domicil in New York, to recover damages from the Procurator-General in respect of damage caused by fire to 113 packages containing gloves of European manufacture—apparently of German manufacture—seized in the parcels mail on board the Swedish vessel *New Sweden* on her way from Scandinavian ports to the United States.

The case raises some question of principle and is quite novel in a good many of its circumstances.

On May 13, 1916, the *New Sweden* called at Kirkwall by order of her owners. She no doubt called by reason of the existence at that time of the Order in Council of March 11, 1915, and the embargo or prohibition which His Majesty—as a belligerent in the war—had found it necessary to put

(1) [1918] A. C. 475. (2) [1920] P. 430.

1921

THE NEW SWEDEN.

The President.

upon commerce between Germany and neutral States. For reasons which did not appear at the hearing and which are not material here, it appeared to those making the necessary examination under the Order in Council of the cargo of the *New Sweden* that there was reason for the belief that in the postal bags there were packages containing goods liable to detention under the Order in Council forwarded in the Swedish mail for the purpose of avoiding that detention. The belief, in fact, proved well founded, because the goods which are here in question—together with a very great number of other consignments of small goods—were among the contents of these postal bags. There were between thirty and forty consignments which, after a postal examination of the bags, were made the subject of proceedings by writ in this Court under the Order in Council, and as to, I think, the whole of these consignments (and certainly with regard to the 113 packages of gloves now in question), there is a decree of the Court—a decree which has not been the subject of any appeal —whereby it was declared that the packages in question, together with the other consignments set forth in the writ, were of enemy origin and were enemy property, and they were ordered to be detained during the war.

The 157 postal bags which were seized and taken possession of by the authority of the Crown upon May 16 on board the *New Sweden* were corded and sealed. The seals of the international mails were not broken by the authority of the immediate captor and on May 16 the surveyor of Customs at Kirkwall, upon receiving these bags in that condition from the naval authorities, handed them over as he received them to the officers of His Majesty's Post Office for delivery to the censor of parcels posts in London. They were duly despatched, and it was in the course of despatch, and while in the care of His Majesty's Postmaster-General, that these mail bags met with an extraordinary accident which has never been explained. While the train was on its way southward on the Highland Railway, fire broke out in the van in which the bags were, and destruction and damage to a considerable extent was done. The fire was extinguished, and on

1921

THE NEW SWEDEN.

The President.

May 19 the appointed Surveyor of Customs, Mr. Rogers, who had been nominated to supervise the examination of the parcels mail taken off neutral vessels and sent to London for examination, taking account of facts which had appeared upon examination of the packages here in question, and of numerous other packages, seized them as prize to the use of His Majesty. In the schedule to Mr. Rogers' affidavit are the series of thirty-three consignments which were so seized, part of the contents of those mail bags which escaped destruction. Of the 159 mail bags, only sixty-two were received by the Customs in London. The parcels here in question were part of the contents of these sixty-two bags. The Surveyor of Customs on June 9, when the examination was complete, seized these parcels and placed them in the custody of the marshal of this Court.

The fire occurred when the packages now in question were in the custody of the captor, using the generic description of "captor" as relating to all the persons acting under the authority of the Crown in the seizure and detention of goods down to the time when the goods are placed in the custody of the marshal. The claim for damages is made both under general prize law and under the terms of the Order in Council of March 11, 1915.

It is perhaps necessary to consider at the outset the position of the Procurator-General. The Procurator-General is sought to be made liable for damages; and under the decisions which govern the matter he must be held liable if there has been misconduct or gross neglect on the part of persons who handled the goods on behalf of the Crown, either in the act of seizure, or during the period of detention which I have mentioned. He may be under some other liability, but that is his general liability, and it has been held that the Procurator-General must answer all complaints in respect of the acts of persons acting in the capacity of captors, not only those by whom the seizure was made, but those by whom the detention was continued, treating the servants of the Crown as one entity in the matter.

So far as the claim is founded upon prize law, it must be

1921

THE NEW SWEDEN.

The President.

founded, as I think, upon an allegation of misconduct or neglect in the captor. It has long ago been decided that the captor by virtue of belligerent right is not an insurer; it really was not contended by Mr. Raeburn on the part of the claimants that the captor was in these cases in truth an insurer. But Mr. Raeburn dealt with the possible effect in prize law of *The United States* (1) with regard to the liabilities which are imposed upon goods brought into prize by virtue of the operation of the Reprisals Order. In that case it was determined that the marshal of the Court who had received into his custody goods seized and detained under the Order in Council, must be reimbursed in respect of costs which he had reasonably incurred for the insurance of these goods. Mr. Raeburn drew attention to the decision as one which might affect the obligations of captors, and which I think he considered must affect the obligations of the marshal. I have only to say, with regard to the decision in *The United States* (1), that it does not relate to general prize law at all, and it does not purport to modify in any way the well-established doctrine that the captor of goods is not an insurer, and is under no obligation to insure. It dealt with expenditure which in cases under the Order in Council had been made by the marshal, and it decided that that expenditure was reasonably made. It may be that at some future time the question may arise whether the marshal is under an obligation in any case to make expenditure which the Court has held in some cases he can reasonably make. That question does not arise here. It would be enough to exclude it from this case to say that the facts which are in question here occurred years before the decision in *The United States*. (1) If they had subsequently occurred, my own view is that the matter would have stood as, in my view, it stands: but there was no enlargement of the obligations of the captor, and there was no duty upon the marshal to insure in this case. The obligation of the captor was to take a fair and reasonable care of these goods. If he has failed in that obligation, under general prize law he must answer a claim for

(1) [1920] P. 430.

1921

THE NEW SWEDEN.

The President.

damages. What is said is that he sent these goods by rail transit to London, though they were destined for sea transit; and as Mr. Raeburn phrased it, he procured a deviation of the voyage which would avoid existing insurances, and placed the goods where the shippers never intended they should be.

I have to consider whether the captor—using that expression collectively—was exercising fair and reasonable care, or failing in his duty in that respect in the action which was taken with regard to the goods. They were lawfully captured; they have been declared to be goods of enemy origin and enemy ownership within the meaning of the Order in Council, and the captor must deal with them. The packages in question were enclosed in the mails of a neutral State, and the mails had to be opened and examined in order to separate these goods, subject to capture, from goods which I may describe compendiously as innocent goods which were the general contents of the mails—at any rate from the residue of the contents of the mails. Now it was hardly suggested on the part of the claimants—and indeed in the reply on the part of the claimants the contrary was admitted—that these goods, required to be examined as mails, ought to have been examined at Kirkwall. There were not facilities for examination on the ship or in the Kirkwall post office. There were the goods of innocent consignors in mails which must be forwarded, and which would be forwarded, through British postal agents. It was almost conceded in reply for the claimants that London was the proper place for such examination.

In my judgment the familiar facts with regard to the examination of these parcel mails in London during the course of years in which the Order in Council was in operation, and the facility with which packages not subject to detention were duly forwarded by mail, is the best evidence that the course which was taken in this case of forwarding seized mails for delivery after proper supervision at a central office in London, was a proper course—if indeed it was not the only practicable course having regard to all the interests concerned. That being so, it seems to me that the allegation

1921

THE NEW SWEDEN.

The President.

that there was any failure of duty—any misconduct or neglect or breach of apparent reasonable care on the part of the captor in forwarding these mails in ordinary course to be examined in London—wholly fails, and so far as prize law is concerned—apart from the Order in Council—this claim fails.

Under the Order in Council it was contended that there had been direct breach of duty in the failure on the part of the captor to deliver these packages forthwith into the custody of the marshal. It was said—and it is the fact—that the marshal had policies of insurance which related to goods detained under the Order in Council which should come into his keeping, and that if these goods had been delivered into the custody of the marshal his policies of insurance would automatically have operated, and thereby at the time when delivery to the marshal took place—as it is said under the Order in Council it might or should have taken place, at Kirkwall—these goods would have become insured stock. It is the fact that if these goods had been delivered into the custody of the marshal at Kirkwall they would have become insured.

I think what has to be ascertained is whether the Order in Council provides in favour of claimants that these goods should be, at the first port they reached after seizure, delivered into the custody of the marshal. If the Order in Council provides that goods such as these, upon arriving at a British port, should be delivered into the custody of the marshal, there has been a failure to do that in this case. If that provision be made for the benefit of the foreign owner and has been disregarded, then it seems to me the foreign owner will have suffered damage by that disregard. *The Südmark* (1) was cited to me on behalf of the Procurator-General. That was a decision of the Privy Council to the effect that directions given as a matter of administration by the Crown to its servants are not directions which enure to the benefit of owners of captured goods as against the captor. But in so far as the Order in Council provides regulations for the disposal of goods detained which on the face of them, under the Order in Council, are for the benefit of the then

(1) [1918] A. C. 475.

owners of the goods, it seems to me the decision in *The Südmark* (1) does not disentitle such owners to the consideration of a claim. If the direction be merely of administrative concern, it is true that no breach of duty on the part of a public officer, as between himself and the Crown, will necessarily give any cause of action to a foreign owner of goods. I think a distinction has to be made in that respect; but the first and main question is to ascertain what the Order in Council in fact directs as to the time of delivery into the custody of the marshal.

Art. 1 of the Order in Council deals only with vessels sailing from foreign ports, and it uses language somewhat different from that with regard to vessels and goods which are the subject of subsequent articles. It is provided under art. 1 that goods on board any vessel which has sailed from her port of departure after March 1, 1915, to any German port, must be discharged in a British port, subject to certain qualifications, and be placed in the custody of the marshal of the Prize Court. That is not this case and the direction is not the same as is given with regard to these goods. The goods here in question were dealt with under art. 4, which says: "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the marshal of the Prize Court."

I have to consider first whether there is a peremptory direction that upon the discharge of any goods from any vessel at a British port under the Order in Council they shall forthwith be placed in the custody of the marshal, and secondly, if there is not such a peremptory direction, whether since there is a direction, what was done in this case sufficiently complies with it. As to peremptory direction, it is to be observed that the goods which are subject to the embargo provided by art. 4 are goods which are of enemy origin or enemy property. Now the goods which were seized

(1) [1918] A. C. 475.

1921

THE NEW SWEDEN.

The President.

were in the Swedish parcels mail, and it could not be said of those mails collectively or of the contents of any one of the bags which constituted the mails, that they were then seized as being of enemy origin or enemy property. The fact was that until examination was made, no ground for seizure to be operative under the Order in Council could become apparent so as to have any effect. The goods which were to be seized were goods of enemy origin and enemy property, and were among others the goods of the present claimant, but they had been so disposed under the protection of neutral mails that they could not be individually and separately seized at Kirkwall. They must be the subject of examination.

I think upon a reasonable construction of art. 4 there was no obligation to put the goods in question into the custody of the marshal until they had been ascertained to be subject to seizure. And inasmuch as I have already come to the conclusion that they could not be so ascertained to be subject to seizure until examination had been made by the British postal authorities of the mails which were the receptacle for these goods of enemy origin and enemy property, the time for delivery to the marshal had not arrived. In my opinion, both upon the express directions of art. 4 and upon the question of the reasonableness of the application of art. 4, the captors—speaking collectively—were within their right not only under prize law but under the Order in Council, in postponing delivery of these goods to the marshal until they could be delivered upon ascertainment, with respect to specific consignments, of the fact that they answered the description which was a necessary ground of any proper detention.

Looking at the facts, both with regard to prize law and with regard to the Order in Council, I have come to the conclusion that this demand for damages fails and ought to be dismissed with costs.

Solicitors for the claimants : *Thomas Cooper & Co.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1921.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1921, will be as follows :—

In the First Series,

[1921] 1 Ch. [1921] 2 Ch.

In the Second Series,

[1921] 1 K. B. [1921] 2 K. B. [1921] 3 K. B. [1921] P.

In the Third Series,

[1921] 1 A. C. [1921] 2 A. C.

INDEX.

ACTION—In rem.
See SHIPPING.

ACTIONS—Limitation of - - - 183
See SHIPPING.

ADMINISTRATION—Enemy debts - 127
See PROBATE.

ADMIRALTY.
See SHIPPING.

ALIMONY—Non-compliance with orders for
See DIVORCE. 299

—— Pendente lite, Time for applying in cases of restitution - - - 404
See DIVORCE.

APPORTIONMENT—Discretion to review
See SHIPPING. 76

ARREST—Competition between Admiralty marshal and sheriff - - 351
See SHIPPING.

AUTHORITY—Master's to pledge owner's credit - - - - - - 22
See SHIPPING.

BAIL—Date for calculation of value of res—Withdrawal of undertaking to put in bail - - - - - 390
See SHIPPING.

BARGE ROADS—Fog signals for craft moored at - - - - - 305
See SHIPPING.

BILL OF LADING.
See SHIPPING.

BIRTH—331 days after last possible connection - - - - 425
See DIVORCE.

BOLSHEVIKS—Status of - - - 97
See SHIPPING.

BOTTOMRY BOND—Requisites for valid contract of - - - - - 351
See SHIPPING.

CARGO—Damage to—Estoppel in bill of lading - - - - - - 337
See SHIPPING.

CARRIAGE OF GOODS.
See SHIPPING.

CASES :—

—— *Ciocci* v. *Ciocci* (1853) 1 Spinks, 121.
Overruled. FOSTER *v.* FOSTER 438

—— *Comtesse de Frègeville, The* (1861) Lush. 329.
Considered and explained. THE MOGILEFF - - - - - 236

—— *El Salto* - - (1908) 25 Times L. R. 99
Considered and explained. THE MOGILEFF - - - - - 236

—— *G.* v. *M.* - (1885) 10 App. Cas. 171, 196.
Ruling of Lord Selborne in, followed. *C.* (*otherwise H.*) v. *C.* 399

—— *Jenny Lind, The* (1872) L. R. 3 A. & E. 529.
Followed. THE EVA - - 454

—— *Keats* v. *Keats* (1859) 1 Sw. & Tr. 334
Approved and followed. CROCKER *v.* CROCKER - - - C. A. 25

—— *Kennedy* v. *Kennedy* [1907] P. 49, 52.
Opinion of Gorell Barnes P. not followed. WILLIAMS *v.* WILLIAMS 131

—— *N.* (*falsely called M.*) v. *M.* (1853) 2 Rob. Ecc. 625, 630.
Ruling of Dr. Lushington in, followed. *C.* (*otherwise H.*) v. *C.* 399

—— *Robertson* v. *Robertson* (1883) 8 P. D. 94, 96.
Dictum of Jessel M.R. approved and applied. SCOTT *v.* SCOTT - 107

CASES—*continued.*

—— *Russell* v. *Russell* [1895] P. 315.
Applied and followed: WALTER *v.* WALTER - - - - - 302

—— *U.* (*falsely called J.*) v. *J.* (1867) L. R. 1 P. & D. 460.
Explained. *C.* (*otherwise H.*) v. *C.* 399

CAVEAT—Practice as regards payment out in default action - - - 454
See SHIPPING.

CHARGING ORDER.
See PRIZE COURT.

CHARTERPARTY.
See SHIPPING.

CHURCH SEATS—Faculty for appropriating
See ECCLESIASTICAL LAW. 381

CLEARING OFFICE—For administration of enemy debts - - - 127
See PROBATE.

COLLISION.
See SHIPPING.

COMPULSORY PILOTAGE.
See SHIPPING.

CONDEMNATION—Prize Court.
See PRIZE COURT.

CONDONATION.
See DIVORCE.

CONTEMPT OF COURT—Further proceedings by party in contempt - 299
See DIVORCE.

CO-RESPONDENT.
See DIVORCE.

COSTS—Application after decree absolute for taxation of costs of guilty wife - - - - - - 417
See DIVORCE.

—— Liability of guardian ad litem for 136
See DIVORCE.

—— Non-compliance with orders for payment of - - - - - 299
See DIVORCE.

—— Security for - - - - - 190
See PRIZE COURT.

—— Security for wife's—Decree nisi made before husband in default - 407
See DIVORCE.

COVENANT—Not to sue for restitution 131
See DIVORCE.

CROWN—Action against servants of - 183
See SHIPPING.

CRUELTY.
See DIVORCE.

CUSTOM OF PORT—Inconsistent with charterparty - - - - - 146
See SHIPPING.

DAMAGES—Sum paid to compromise claim for - - - - - - 224
See PRIZE COURT.

DANTZIG—Effect of Treaty of Versailles on citizens of - - - 155
See PRIZE COURT.

DAYS OF GRACE.
See PRIZE COURT.

DEBTS—Administration of enemy - 127
See PROBATE.

DECREE ABSOLUTE—Application of guilty party to make decree absolute 421
See DIVORCE.

DECREE NISI—Right of party in whose favour decree was made to rescind
See DIVORCE. 421

DEFAULT ACTION—Practice as regards payment out - - - 454
See SHIPPING.

DESTINATION—Refusal to allow cargo to be carried to port of - - 38
See PRIZE COURT.

DETENTION—Ship - - - - - 38
See PRIZE COURT.

DISCRETION—To extend time in limitation proceedings - - - - - 52
See SHIPPING.

—— To review apportionment - - 76
See SHIPPING.

DISTRIBUTION—Proceeds in limitation proceedings - - - - - 52
See SHIPPING.

DIVORCE—*Condonation — Forgiveness by Letter — Reinstatement of Wife—Agreement not to sue.* CROCKER *v.* CROCKER - **C. A. 25**

2. —— *Domicil — Residence — Matrimonial Jurisdiction of Indian Courts—Dissolution of Marriage between English Subjects resident but not domiciled in India—Validity — Indian Divorce Act,* 1869 (*Act IV. of* 1869)—*Indian Councils Act,* 1861 (24 *&* 25 *Vict. c.* 67)—*East India High Courts Act,* 1861 (24 *&* 25 *Vict. c.* 104). KEYES *v.* KEYES AND GRAY - - **Duke, Pres. 204**

3. —— *Husband and Wife — Restitution of Conjugal Rights—Alimony pendente lite—Time for applying—Disobedience to decree for Restitution—Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 2. VER MEHR *v.* VER MEHR - - - - **Duke, Pres. 404**

4. —— *Husband's Petition for Divorce — Costs of guilty Wife—Order of Registrar for payment of taxed Costs and Security—Decree made before Husband in Default—Order still Valid — Wife's Affidavit of Merits — No Denial of Adultery in Affidavit — At hearing neither Wife nor Co-respondent put into Witness Box — Sufficiency of Affidavit — Duty of Wife's Solicitor — Practice*

DIVORCE—*continued.*

Memorandum on Divorce Rule 158 *issued by Sir F. Jeune in* 1902—*Right to question Wife as to Adultery—Evidence Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3. FRANKLIN *v.* FRANKLIN AND MINSHALL - **McCardie J. 407**

5. —— *Nullity—Impotency quoad hanc—Sufficiency of averment—Conflict of Evidence. C.* (*otherwise H.*) v. *C.* **Lord Birkenhead L.C. 399**

6. —— *Period of Gestation—Birth* 331 *Days after last possible Connection.* GASKILL *v.* GASKILL - - **Lord Birkenhead L.C. 425**

7. —— *Practice — Costs — Alimony — Non-compliance with Orders — Contempt — Further Proceedings by Party in Contempt—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4. LEAVIS *v.* LEAVIS - - **Hill J. 299**

8. —— *Practice — Costs of guilty Wife—Husband's Petition for Divorce—Security for Wife's Costs paid into Court—Decree Nisi made at Hearing—No Application as to Wife's Costs at Hearing or before Decree Absolute—Application after Decree Absolute for Taxation of Wife's Costs and Payment out of Court refused.* BEETON *v.* BEETON AND ROBERTSON - - - **Duke, Pres. 417**

9. —— *Practice — Costs — Infant Husband's Petition—Guardian ad litem—Petition dismissed—Liability for Costs.* RUTTER *v.* RUTTER - - - - **Horridge J. 136**

10. —— *Practice — Matrimonial Home — Petition for Restitution of Conjugal Rights—Right of Wife to reside in Matrimonial Home pending Suit—Injunction.* WILLMOTT *v.* WILLMOTT - - - - **Hill J. 143**

11. —— *Practice — Permanent Maintenance — Agreement by Wife to accept Sum which had been by Consent allowed pendente lite—Leave to present Petition out of Time—Application to Judge—Jurisdiction of Court to increase Amount—Construction of Agreement—Jurisdiction of Registrar—"On any decree for dissolution or nullity of marriage"—Matrimonial Causes Act,* 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-ss.* 1, 2. SCOTT *v.* SCOTT **Duke, Pres. and C. A. 107**

12. —— *Practice—Rescission of Decree Nisi—Right of Party in whose Favour Decree was made to rescind—Application of guilty Party to make Decree absolute.* RUTTER *v.* RUTTER (No. 2) - - **Duke, Pres. 421**

13. —— *Practice—Restitution of Conjugal Rights — Substituted service of* (1.) *Decree,* (2.) *Demand for return to Cohabitation required by Divorce Rule* 175*—Service out of the Jurisdiction—Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 2*—Divorce Rules* 175, 221, 222. PALMER *v.* PALMER - **Horridge J. 378**

14. —— *Practice—Restitution of Conjugal Rights — Summons by Respondent to stay Proceedings—Divorce Rule* 176. BARCROFT *v.* BARCROFT - - - **Duke, Pres. 435**

DIVORCE—*continued.*

15. —— *Restitution of Conjugal Rights—Agreement to live Apart—Effect of Agreement—Matrimonial Causes Act,* 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5. WALTER *v.* WALTER **Lord Birkenhead L.C. 302**

16. —— *Wife's Petition — Cruelty—Husband suffering from venereal Disease—Intercourse against Wife's Wishes—Non-communication of Disease—Reasonable Apprehension of Danger to Health.* FOSTER *v.* FOSTER **C. A. 438**

17. —— *Wife's Petition for Restitution of Conjugal Rights—Deed of Separation—Covenant not to sue for Restitution—Deed not pleaded by Husband—No Evidence of Repudiation of Deed—Decree made notwithstanding Covenant.* WILLIAMS *v.* WILLIAMS **Duke, Pres. 131**

DOCK—Rules applicable to vessel coming out - - - - - - **318**
See SHIPPING.

DOCK OWNERS—Limitation of liability by - - - **70, 274**
See SHIPPING.

—— Rights of detention - - - **279**
See SHIPPING.

DROITS—Admiralty - - - - **218**
See PRIZE COURT.

—— Crown - - - - - - **218**
See PRIZE COURT.

ECCLESIASTICAL LAW—*Faculty—Church Seats—Discretion of Court to decree Faculty for appropriating Church Seats.*
EARL BATHURST *v.* VICAR, CHURCHWARDENS AND PARISHIONERS OF CIRENCESTER **Arches Court of Canterbury 381**

ENEMY DEBTS—Clearing-house for administration - - - - - **127**
See PROBATE.

ENEMY SHIP—Outbreak of war - **1**
See PRIZE COURT.

ESTOPPEL—In bill of lading - - **337**
See SHIPPING.

EVIDENCE—Conflict of, in nullity suits
See DIVORCE. **399**

FACULTY—For appropriating church seats
See ECCLESIASTICAL LAW. **381**

FAIRWAY—Craft moored at barge roads **305**
See SHIPPING.

FI. FA.—Seizure of ship by sheriff under writ of—Judgment debtors not owners of whole ship - - **351**
See SHIPPING.

FIRE—Seizures from parcels mail damaged by - - - - - - **473**
See PRIZE COURT.

FOG SIGNALS—For craft moored at barge roads - - - - - - 305
See SHIPPING.

FOREIGN TAX—On sale of vessel - 454
See SHIPPING.

FOREIGN VESSEL—Necessaries supplied to 22
See SHIPPING.

FORFEITURE—Of salvage for misconduct 90
See SHIPPING.

FORGIVENESS—Of guilty party without reinstatement - - - - - 25
See DIVORCE.

GESTATION—Period of - - - 425
See DIVORCE.

GIBRALTAR—Admiralty waters—Pilotage 12
See SHIPPING.

GUARDIAN AD LITEM—Liability for costs of infant petitioner - - 136
See DIVORCE.

HAGUE CONVENTION.
See PRIZE COURT.

HUSBAND AND WIFE.
See DIVORCE.

IMPOTENCY—Averment of, quoad hanc 399
See DIVORCE.

INDIAN COURTS—Matrimonial jurisdiction of - - - - - - 204
See DIVORCE.

INFANT—Liability for costs of infant petitioner - - - - - - 136
See DIVORCE.

INSURANCE PREMIUMS—Charges on Naval Prize Fund - - - - - 224
See PRIZE COURT.

JURISDICTION—Of Court to increase permanent maintenance - - 107
See DIVORCE.

—— Of Registrar to give leave to file petition for permanent maintenance - 107
See DIVORCE.

KING'S SHIP—Action against commanding officer - - - - - 183
See SHIPPING.

LARCENY—By salvors—Effect on owners 90
See SHIPPING.

LICENCE—For goods in transit - - 38
See PRIZE COURT.

LIFE SALVAGE—Claim by engaged tug 372
See SHIPPING.

LIMITATION—Of actions - - - 183
See SHIPPING.

—— Of liability - - 52, 312, 444
See SHIPPING.

—— Priorities - - - - - - 279
See SHIPPING.

MAINTENANCE—Permanent, Petitions for 107
See DIVORCE.

MARITIME CONVENTIONS ACT 76, 183
See SHIPPING.

MATRIMONIAL CAUSES ACTS - 107, 302, 378, 404
See DIVORCE.

MATRIMONIAL HOME—Right of wife to reside in pending suit - - 143
See DIVORCE.

MERCANTILE ACCOUNT—Action in rem for balance of - - - 236
See SHIPPING.

MERCHANT SHIPPING ACTS.
See SHIPPING.

MERSEY DOCKS AND HARBOUR BOARD—Statutory powers - - 279
See SHIPPING.

MILITARY FORCES—Captures by - 218
See PRIZE COURT.

MISCONDUCT—Of salvors—Effect on shipowners - - - - - 90
See SHIPPING.

MONTEVIDEO—Navigation of entrance to 76
See SHIPPING.

NAVAL PRIZE FUND.
See PRIZE COURT.

NAVAL PRIZE TRIBUNAL.
See PRIZE COURT.

NECESSARIES—Mercantile account - 236
See SHIPPING.

—— Priorities - - - - - - 351
See SHIPPING.

—— Supplied to vessel under time charter 22
See SHIPPING.

NULLITY.
See DIVORCE.

PARCELS MAIL—Damage by fire - 473
See PRIZE COURT.

PETITION — For maintenance — Leave to present out of time - - 107
See DIVORCE.

PETITIONER—Costs of unsuccessful infant 136
See DIVORCE.

PILOTAGE.
See SHIPPING.

PORT OF LONDON RIVER BYE-LAWS—Fog signals for craft moored at barge roads - - - - - 305
See SHIPPING.

PRACTICE—Admiralty.
See SHIPPING.

—— Divorce.
See DIVORCE.

—— Prize Court.
See PRIZE COURT.

PRINCIPAL AND AGENT—Action in rem for necessaries - - - 236
See SHIPPING.

PRIORITIES—Competition between sheriff and Admiralty marshal - - 351
See SHIPPING.

—— Limitation of liability - - 279
See SHIPPING.

—— Wages and necessaries—Master part-owner - - - - - - 454
See SHIPPING.

PRIZE COURT—*Charterparty — Transit Licence—British Government's refusal to allow Cargo to be carried to Port of Destination — Detention of Ship—Liability of Charterers to Shipowners.* THE LISA - **Duke, Pres. 38**

2. —— *Droits of Admiralty — Droits of the Crown—Captures by Military Forces—Naval Prize Act*, 1918 (8 & 9 *Geo.* 5, *c.* 30). THE ANICHAB - **Naval Prize Tribunal 218**

3. —— *Enemy Merchant Ship in British Port—Outbreak of War—Seizure—Detention—Days of Grace—Hague Convention, No. VI. of* 1907*—Absence of Reciprocity—Condemnation.* THE MARIE LEONHARDT **Duke, Pres. 1**

4. —— *Free City of Dantzig—Ships owned by Dantzig Corporation—Seizure on outbreak of War—Treaty of Versailles*, 1920, *Pt. III., s. XI., arts.* 100–109; *Pt. X., s. IV., art.* 297*—Condemnation.* THE BLONDE **Duke, Pres. 155**

5. —— *Naval Prize Fund—Charges upon the Fund—Naval Prize Act*, 1918 (8 & 9 *Geo.* 5, *c.* 30), *Sch., Pt. II., para.* 5. THE OSCAR II.; THE BERNISSE; THE ELVE **Naval Prize Tribunal 173**

6. —— *Naval Prize Fund—Charges upon the Fund—Sum paid to compromise Claim for Damages—Authority to create Charges on the Fund—Premiums of Insurance—Naval Prize Act*, 1918 (8 & 9 *Geo.* 5, *c.* 30), *Sch., Pt. II., paras.* 1 *and* 5. THE OREGON; THE CAIRNSMORE; THE GUNDA **Naval Prize Tribunal 224**

7. —— *Practice — Costs — Charging Order—Security for Costs—Prize Court Rules*, 1914, *Order XVIII., r.* 1; *Order XLV.* THE ORANJE NASSAU - - **Duke, Pres. 190**

8. —— *Seizures from Parcels Mail—Transit by Rail—Packages damaged by Fire — Marshal's Custody — Insurance — Reprisals Order in Council of March* 11, 1915, *art.* 4. THE NEW SWEDEN - - **Duke, Pres. 473**

PROBATE—*Practice — Admission—Enemy Debt—Debt due from an English Firm payable before the War to Enemy since Deceased—Clearing Office for Enemy Debts—Grant of Administration to Controller—Treaty of Peace Order, No.* 1517 (*S. R. & O.*, 1919, *II., p.* 198), *s.* 1 (*i*), (*ii*), (*iv*)*—Treaty of Versailles, s. III., Debts, art.* 296. IN THE ESTATE OF GUSTAV BLUHM (DECEASED) - **Duke, Pres. 127**

PROBATE—*continued.*

2. —— *Will — Revocation — Soldier "in actual military service"—Will executed in accordance with requirements of Wills Act—Letter by Testator requesting Will to be burnt—Will burnt not in presence of Testator—Intention to revoke—Wills Act*, 1837 (1 & 2 *Vict. c.* 26), *ss.* 9, 11, 20. *In the Estate of* GOSSAGE (DECEASED). WOOD *v.* GOSSAGE **C. A. 194**

PUBLIC AUTHORITIES PROTECTION ACT, 1893 - - - - - - 183
See SHIPPING.

REGISTRAR—Jurisdiction to give leave to file petition for permanent maintenance - - - - 107
See DIVORCE.

REPRISALS ORDER IN COUNCIL.
See PRIZE COURT.

RESTITUTION OF CONJUGAL RIGHTS.
See DIVORCE.

RULES AND ORDERS:—

—— *Collisions at Sea, Regulations for Preventing, arts.* 19, 21, 27 *and* 28: THE KARAMEA - - - 76

—— —— *arts.* 19 *and* 28: THE GULF OF SUEZ - - - - - - 318

—— *Divorce Rules*, 158: FRANKLIN *v.* FRANKLIN AND MINSHALL - 407

—— —— *rr.* 175, 221, 232: PALMER *v.* PALMER - - - - 378

—— —— *r.* 176: BARCROFT *v.* BARCROFT 435

—— *Gibraltar Regulations of* 1913: THE ARUM - - - - - 12

—— *Order in Council of March* 22, 1911, *providing for the Definition and Control of Admiralty Waters in Gibraltar*: THE ARUM - - - 12

—— *Order in Council of March* 11, 1915 (*Reprisals*): THE NEW SWEDEN 473

—— *Peace Treaty Order, No.* 1517 (*S. R. & O.*, 1919, *II., p.* 198), *s.* 1 (*i*), (*ii*), (*iv*): *In the Estate of* GUSTAV BLUHM (DECEASED) - - 127

—— *Port of London River Bye-Laws*, 1914, *art.* 28: THE LAKE FARRAGUT 305

—— *Prize Court Rules*, 1914, *Order* XVIII., *r.* 1; *Order* XLV.: THE ORANJE NASSAU - - - - - 190

—— *Proclamation of Acting Governor of Gibraltar of July* 30, 1914: THE ARUM - - - - - - 12

—— *Supreme Court, Rules of, Order* LXV., *r.* 27: THE IBIS VI. - - 255

SALVAGE—Absence of benefit to salved property - - - - - 372
See SHIPPING.

—— Misconduct of salvors - - - 90
See SHIPPING.

—— Rescue from Bolsheviks - - 97
See SHIPPING.

SECURITY FOR COSTS.
See PRIZE COURT.

SEIZURE—Enemy ship in British port 1
See PRIZE COURT.

SEPARATION—Covenant not to sue for restitution in deed of - - 131
See DIVORCE.

SHERIFF—Seizure of ship by - - 351
See SHIPPING.

SHIPPING—*Actions in rem — Priorities — Wages and Necessaries Men—Master who is part Owner — Foreign Tax on Sale of Vessels —Payment out of Court in default Actions—Caveats—Practice.* THE EVA - **Hill J. 454**

2. —— *Carriage of Goods — Damage to Cargo—Bill of Lading—"Shipped in good order and condition"—"Weight, quality, condition and measure unknown"—Shipment of Potatoes in wet Bags—Estoppel.* THE TROMP **Duke, Pres. 337**

3. —— *Charterparty — Custom of Port —Custom inconsistent with Charterparty — "Cargo to be taken from alongside at charterer's expense as customary"—Exclusion of Evidence of Custom throwing Expense on Shipowner.* THE TURID - - **C. A. 146**

4. —— *Collision action in rem — Solicitors' Undertaking to put in Bail — Withdrawal of Undertaking — Arrest of Vessel — Waiver— Amount of Bail— Value of Res — Date for Calculation of Value.* THE BORRE **Duke, Pres. 390**

5. —— *Collision — Fog Signals—Craft moored at Barge Roads—Port of London River Bye-Laws, art.* 28. THE LAKE FARRAGUT - - - - **Duke, Pres. 305**

6. —— *Collision — Limitation of Liability — Distribution of Proceeds—Plaintiff's Right to claim against Fund— Unascertained Claims — Discretion — Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504. THE KRONPRINZ OLAV - - **C. A. 52**

7. —— *Collision—Limitation of Liability —Privity of Owners—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503. THE BRISTOL CITY - - - - **C. A. 444**

8. —— *Collision—Navigation of Entrance to Montevideo Harbour — Rounding the Whistle Buoy—"Keep course and speed"—Whistle Signals—Both to blame — Apportionment of Blame — Discretion to review Apportionment — Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27 *and* 28—*Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1. THE KARAMEA - **C. A. 76**

9. —— *Collision—Steamship coming out of Dock —Crossing Rule—Helm Action to counteract Tide—Whistle Signals—Regulations for Preventing Collisions at Sea,* 1897, *arts.* 19, 28. THE GULF OF SUEZ - - - **C. A. 318**

SHIPPING—*continued.*

10. —— *Collision with Dock Gates — Dockowners' Rights of Detention—Statutory Powers of the Mersey Docks and Harbour Board—Limitation of Liability—Priorities—Mersey Dock Acts Consolidation Act,* 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504, 530—*Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Act,* 1912 (2 *&* 3 *Geo.* 5, *c. xii.*), *s.* 7. THE COUNTESS - - **Duke, Pres. 279**

11. —— *Compulsory Pilotage — Gibraltar Admiralty Waters—Order in Council of March* 22, 1911, *providing for the Definition and Control of Admiralty Waters in Gibraltar —Regulations of* 1913—*Proclamation of Acting Governor of July* 30, 1914—*Pilotage Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 15 *and* 61. THE ARUM - - - - **Hill J. 12**

12. —— *Dockowners—Limitation of Liability—Damage Outside Dock Area—Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 *&* 64 *Vict. c.* 32), *s.* 2. THE CITY OF EDINBURGH - - **Hill J. 70**; **affirmed C. A. 274**

13. —— *Limitation of Liability — "Improper navigation"—Breach of Contract of Towage — Improperly casting off Tow Rope — Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503—*Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 *&* 64 *Vict. c.* 32), *s.* 1. THE VIGILANT - - - - **Duke, Pres. 312**

14. —— *Necessaries — Action in rem — Principal and Agent—Balance of Mercantile Account—Shipowners' Agents, Rights in rem — Admiralty Court Act,* 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Admiralty Court Act,* 1861 (24 *Vict. c.* 10), *s.* 5. THE MOGILEFF - **Hill J. 236**

15. —— *Practice — Costs— Allowances to Witnesses—Measures of Compensation for Detention—Detention of Expensive Witnesses —Examination on Commission—Party and Party Costs—Order* LXV., *r.* 27. THE IBIS VI. **C. A. 255**

16. —— *Public Authority—Servants of the Crown— Action against Commanding Officer of King's Ship—Limitation of Actions — Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61)—*Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8. THE DANUBE II. **C. A. 183**

17. —— *Salvage—Misconduct of Salvors —Larceny by Master and Crew—Forfeiture of Salvage—Effect on Owners of salving Vessel.* THE KENORA - - - - **Hill J. 90**

18. —— *Salvage—Property brought into comparative Safety — Absence of Benefit to salved Property—Life Salvage—Claim by engaged Tug.* THE TARBERT - **Hill J. 372**

19. —— *Salvage—Rescue from Bolsheviks —Status of Bolsheviks—Comity of Nations—Voluntariness.* THE LOMONOSOFF - **Hill J. 97**

SHIPPING—*continued.*

20. —— *Seizure of Ship by Sheriff under Writ of fi. fa.—Judgment Debtors not Owners of whole Ship—Arrest by Admiralty Marshal in Actions in rem — Maritime Liens — Necessaries Claims — Insufficient Proceeds—Priorities—Bottomry Bond—Requisites for valid Contract of Bottomry.* The James W. Elwell - - - - - - Hill J. 351

21. —— *Towage — Breach of Contract—Exceptions in Towage Contract—"Default of steam tug owner"—Failure to carry out Contract.* The Cap Palos - - C. A. 458

22. —— *Vessel under Time Charter — Necessaries—Action in Rem—Master's Authority to pledge Owner's Credit.* The Tolla Hill J. 22

SOLDIER'S WILL.
See Probate.

SOLICITORS—Withdrawal of undertaking to put in bail - - - 390
See Shipping.

STATUTES:—
Imperial.

1837.
1 Vict. c. 26 (Wills), ss. 9, 11, 20: Wood *v.* Gossage - - - 194

1840.
3 & 4 Vict. c. 65 (Admiralty Court). s. 6: The Mogileff - - - 236

1858.
21 & 22 Vict. c. xcii. (Mersey Dock Acts Consolidation), s. 94: The Countess - - - - 279

1861.
24 Vict. c. 10 (Admiralty Court), s. 5: The Countess - - - - 279
24 & 25 Vict. c. 67 (Indian Councils): Keyes *v.* Keyes and Gray - 204
24 & 25 Vict. c. 104 (Indian High Courts): Keyes *v.* Keyes and Gray - - - - - - 204

1869.
32 & 33 Vict. c. 62 (Debtors), s. 4: Leavis *v.* Leavis - - - - 299
—— c. 68 (Evidence Amendment), s. 3: Franklin *v.* Franklin and Minshall - - - - - - 407

1884.
47 & 48 Vict. c. 68 (Matrimonial Causes), s. 2: Palmer *v.* Palmer - 378
Ver Mehr *v.* Ver Mehr - 404
—— —— s. 5: Walter *v.* Walter 302

1893.
56 & 57 Vict. c. 61 (Public Authorities Protection), s. 1: The Danube II. 183

1894.
57 & 58 Vict. c. 60 (Merchant Shipping), s. 503: The Vigilant - 312
The Bristol City - - 444

STATUTES—*continued.*
57 & 58 Vict. c. 60 (Merchant Shipping), ss. 503, 504: The Kronprinz Olav - - - - C. A. 52
—— —— ss. 503, 504, 530: The Countess - - - - - - 279

1900.
63 & 64 Vict. c. 32 (Merchant Shipping, Liability of Shipowners and Others), s. 1: The Vigilant - - 312
—— —— ss. 1, 3: The Countess - 279
—— —— s. 2: The City of Edinburgh 70, 274

1907.
7 Edw. 7, c. 12 (Matrimonial Causes), s. 1, sub-ss. 1, 2: Scott *v.* Scott - 107

1911.
1 & 2 Geo. 5, c. 57 (Maritime Conventions), s. 1: The Karamea - 76
—— —— s. 8: The Danube II. - 183

1912.
2 & 3 Geo. 5, c. xii. (Mersey Docks and Harbour), s. 7: The Countess 279

1913.
2 & 3 Geo. 5, c. 31 (Pilotage), ss. 15, 61: The Arum - - - - 12

1918.
8 & 9 Geo. 5, c. 30 (Naval Prize), Sch., Pt. II., para 1: The Cairnsmore and The Gunda - - - 224
—— —— para. 5: The Bernisse and The Elve - - - - 173
The Oregon - - - 224

India.

1869.
Act IV. of 1869 (Indian Divorce): Keyes *v.* Keyes and Gray - - 204

SUBSTITUTED SERVICE—Of decree and demand for return to cohabitation
See Divorce. 378

TIME CHARTER—Necessaries supplied to ship - - - - - - 22
See Shipping.

TOWAGE—Breach of contract—Exceptions in towage contract — "Default of steam tug owner"—Failure to carry out contract - - 458
See Shipping.

—— Limitation of liability for breach of contract - - - - - 312
See Shipping.

VERSAILLES, TREATY OF.
See Prize Court.

WAIVER—Undertaking to put in bail 390
See Shipping.

WIFE—Right in interlocutory proceedings to question as to adultery - **404**
See DIVORCE.

WILL—Revocation of soldier's - - **194**
See PROBATE.

WITNESSES—Measure of compensation **255**
See SHIPPING.

WORDS—"Cargo to be taken from alongside at charterer's expense as customary": THE TURID - **C. A. 146**

WORDS—*continued.*
—— "Default of steam tug owner": THE CAP PALOS - - - **C. A. 458**
—— "Fairway": THE LAKE FARRAGUT **305**
—— "On any decree for dissolution or nullity of marriage": SCOTT *v.* SCOTT - - - - - **107**
—— "Shipped in good order and condition." "Weight, quality, condition and measure unknown." THE TROMP **337**

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INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

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(Including Bankruptcy, Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

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PART II.—FEBRUARY 2.

TABLE OF CASES.

KING'S BENCH DIVISION.

	PAGE
ATTORNEY-GENERAL *v.* ANDERTON ..	159
ATTORNEY-GENERAL *v.* CHAMBRES ..	173
ATTORNEY-GENERAL *v.* SELBY BRIDGE CO.	149
BARWICK *v.* SOUTH EASTERN AND CHATHAM RY. COS. .. .. (C.A.)	187
BERESFORD *v.* RICHARDSON	243
CLARK *v.* COX, MCEUEN & CO. (C.A.)	139
HALL & CO. *v.* INLAND REVENUE COMMISSIONERS	213
HARRISONS *v.* SHIPPING CONTROLLER..	122
LONDON AND NORTH WESTERN RY. CO. *v.* RICKERBY	231
OLDHAM, ASHTON AND HYDE ELECTRIC TRAMWAYS *v.* ASHTON CORPORATION	269
PORCHESTER GATE, PADDINGTON, *In re.* JOHNSTON *v.* MACONOCHIE (C.A.)	239
REX *v.* LYON. *Ex parte* HARRISON..	203
REX *v.* RICHMOND CONFIRMING AUTHORITY. *Ex parte* HOWITT	248
SPRINGER *v.* GREAT WESTERN RY. CO. (C.A.)	257
THORNETT AND FEHR AND YUILLS, *In re.*	219

PROBATE DIVISION.

	PAGE
ARUM, THE	12
TOLLA, THE	22

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

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